Character Evidence in the Courts of Classical Athens

Rhetoric, Relevance and the Rule of Law

Vasileios Adamidis

ROUTLEDGE

Character Evidence in the Courts of Classical Athens

There has been much debate in scholarship over the factors determining the outcome of legal hearings in classical Athens. Specifically, there is divergence regarding the extent to which judicial panels were influenced by non-legal considerations in addition to, or even instead of, questions of law. Ancient rhetorical theory and practice devoted much attention to character and it is this aspect of Athenian law which forms the focus of this book. Close analysis of the dispute-resolution passages in ancient Greek literature reveals striking similarities with the rhetoric of litigants in the Athenian courts and thus helps to shed light on the function of the courts and the fundamental nature of Athenian law. The widespread use of character evidence in every aspect of argumentation can be traced to the Greek ideas of 'character' and 'personality', the inductive method of reasoning, and the social, political and institutional structures of the ancient Greek polis. According to the author's proposed method of interpretation, character evidence was not a means of diverting the jury's attention away from the legal issues; instead, it was a constructive and relevant way of developing a legal argument.

Vasileios Adamidis is a Lecturer / Senior Lecturer in Nottingham Law School at Nottingham Trent University. He holds a Doctorate in Law from the University of Exeter and a Master's Degree in International Law with International Relations from the University of Kent. With a keen interest in the theory, history and philosophy of law and its relation with politics, sociology and psychology, Vasileios is a proponent of the interconnection of the currently unduly fragmented social sciences.

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

Character Evidence in the Courts of Classical Athens

Rhetoric, Relevance and the Rule of Law

Vasileios Adamidis

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2017
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2017 Vasileios Adamidis

The right of Vasileios Adamidis to be identified as author of this work has been asserted by him in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Names: Adamidis, Vasileios, author.
Title: Character evidence in the courts of classical Athens: rhetoric, relevance and the rule of law / Vasileios Adamidis.
Description: Abingdon, Oxon; New York, NY: Routledge, 2017.
Identifiers: LCCN 2016024152 | ISBN 9781472483690 (hardback: alk. paper) | ISBN 9781315571300 (ebook)
Subjects: LCSH: Witnesses (Greek law) | Reputation (Greek law) | Law—Greece—Athens—History—To 1500—Sources.
Classification: LCC KL4350 .A33 2017 | DDC 347.38/5066—dc23
LC record available at https://lccn.loc.gov/2016024152

ISBN: 978-1-472-48369-0 (hbk)
ISBN: 978-1-315-57130-0 (ebk)

Typeset in Times New Roman
by Apex CoVantage, LLC

Contents

	Notes on conventions	vi
	Introduction	1
1	The archaic origins of character evidence: from Homer to Classical Athens	21
2	Incentives for wide use of character evidence in the Athenian legal system	55
3	Greek ideas of 'character'	99
4	Methods of providing evidence from character in Athenian courts	139
5	Greek perceptions of 'personality' applied in the Athenian courts	168
6	Purposes of character evidence in the courts of Athens – predominance of law or rhetoric?	203
	Conclusions	221
	Index	227

Notes on conventions

Ancient authors

In the footnotes I abbreviate names and works of ancient authors as in H.G. Liddell and R. Scott (eds), *Greek-English Lexicon* (1st ed. 1843), Oxford: Clarendon Press (1996), and in P.G.W. Glare (ed.), *Oxford Latin Dictionary*, Oxford: Clarendon Press (1982).

I have used Greek texts from the Perseus Digital Library, accessible online via *www.perseus.tufts.edu/hopper/*. I have italicised the Greek text and the translation in words or phrases that I consider of special importance. At times, in quoting Greek or Latin texts, I choose to omit certain sentences or parenthetical expressions: this will be indicated with the sign '[. . .]'.

I have used published translations of Greek texts, usually modified by me, for the following works:

HOMER:

Murray A.T. (ed.) (1919), *The Odyssey*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.

——— (1924), *The Iliad*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.

HOMERIC HYMNS:

Evelyn-White H.G. (ed.) (1914), *The Homeric Hymns and Homerica*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.

ARISTOTLE:

Freese J.H. (ed.) (1926), 'The Rhetoric', in *Aristotle in 23 Volumes*, Vol. 22, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.

Rackham H. (ed.) (1934), 'The Nicomachean Ethics', in *Aristotle in 23 Volumes*, Vol. 19, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.

——— (1944), 'The Politics', in *Aristotle in 23 Volumes*, Vol. 21, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
——— (1952), 'The Athenian Constitution', in *Aristotle in 23 Volumes*, Vol. 20, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.

PLATO:

Fowler H.N. (1925), 'Parmenides, Philebus, Symposium, Phaedrus', in *Plato in Twelve Volumes*, Vol. 9, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
——— (1955), 'Euthyphro, Apology, Crito, Phaedo', in *Plato in Twelve Volumes*, Vol. 1, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
Lamb W.R.M. (1955), 'Alcibiades 1, Alcibiades 2, Hipparchus, Lovers, Theages, Charmides, Laches, Lysis', in *Plato in Twelve Volumes*, Vol. 8, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
——— (1967), 'Euthydemus, Protagoras, Gorgias, Meno', in *Plato in Twelve Volumes*, Vol. 3, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
Lee D. (2003), *The Republic* (first edition 1955), Penguin Books Ltd.
Shorey P. (1969), 'The Republic', in *Plato in Twelve Volumes*, Vols 5 & 6, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.

ATTIC ORATORS:

Adams C.D. (1919), *Aeschines*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
Bers V. (2003), *Demosthenes, Speeches 50–59*, Austin, TX: University of Texas Press.
Carey C. (2000), *Aeschines*, Austin, TX: University of Texas Press.
DeWitt N.J. (1949), *Demosthenes*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
Edwards M. (2007), *Isaeus*, Austin, TX: University of Texas Press.
Gagarin M. and MacDowell D.M. (1998), *Antiphon and Andocides*, Austin, TX: University of Texas Press.
Harris E.M. (2008), *Demosthenes, Speeches 20–22*, Austin, TX: University of Texas Press.
Lamb W.R.M. (1930), *Lysias*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
MacDowell D.M. (2004), *Demosthenes, Speeches 27–38*, Austin, TX: University of Texas Press.
Maidment K.J. (1968), *Minor Attic Orators in Two Volumes 1, Antiphon Andocides*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
Murray A.T. (1939), *Demosthenes*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.

Norlin G. (1980), *Isocrates*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
Scafuro A.C. (2011), *Demosthenes, Speeches 39–49*, Austin, TX: University of Texas Press.
Todd S.C. (2000), *Lysias*, Austin, TX: University of Texas Press.
Vince C.A., Vince H.A. (1926), *Demosthenes*, Cambridge, MA: Harvard University Press; London, William Heinemann Ltd.
Worthington I., Cooper C., Harris E.M. (2001), *Dinarchus, Hyperides, and Lycurgus*, Austin, TX: University of Texas Press.
Yunis H. (2005), *Demosthenes, Speeches 18 and 19*, Austin, TX: University of Texas Press.

Modern works

The following modern works are abbreviated:

DK Diels H. and Kranz W. (eds), *Die Fragmente der Vorsokratiker, griechische und deutsche* (12th ed.), 1966.
OED Simpson J.A. and Weiner E.S.C. (eds), *The Oxford English Dictionary* (1st ed. 1933), Oxford: Clarendon Press, 1989.
LSJ Liddell H.G., Scott R. and Jones H.S. (eds), *Greek-English Lexicon* (1st ed. 1843), Oxford: Clarendon Press, 1996.

Legal cases and materials

The citation of legal cases and materials follows the Oxford University Standard for Citation of Legal Authorities (OSCOLA).

Introduction

The character of man is his fate (*ἦθος ἀνθρώπῳ δαίμων*) according to Heraclitus[1]. The word *ἦθος* derives from *ἔθος* (habit). Cumulatively, the habits of a person make up his character, thus highlighting the typical Greek inductive method of reasoning through which a multitude of past acts serves to attest to a human's true nature. In apparent contradistinction to 'human' nature, the word *δαίμων* indicates a god, a deity or divine power.[2] Its root meaning denotes 'one who distributes or assigns a portion'.[3] Destiny and fate are perfectly suitable words to convey the symbolic meaning of this word in its Heraclitean use. Character, as designated by a person's past acts, is responsible for his fate. Man himself, not any deity, controls his destiny. If this interplay of the divergent meanings of the word *δαίμων* is pushed to the extreme, man through his character and actions creates or controls his personal *δαίμων*. So strong is the sense of individual responsibility; so decisive is human control over life.

The Heraclitean *δαίμων* is neither the anthropomorphic deity of the poets[4] nor the subject of the conventional religious beliefs (observed as fictitious by Democritus, Prodicus or the theatrical Sisyphus[5]). It is an expression of the divine element in the human being which can take many forms.[6] On an allegoric level it symbolises the reconciliation or even unity of nature (natural philosophy) with the divine (religion). The supernatural (in the form of fate) is influenced by humans to the extent that man (through his character) directs his own future. In this way, character as a *δαίμων*, a constant indicator, is attributed probative value for deeds of the past and predictive value for the future. So it is not a coincidence that the same people who held these beliefs about character allowed character evidence to break into the courtrooms in order to promote the quest for the discovery of truth.

The main question

Character evidence was widely used in the courts of classical Athens. This raises significant issues as to the reasons for this practice. The central question of this research concerns the causes and the aims of this wide use of character evidence in the Athenian courts. In the ancient forensic speeches, litigants proceed to argumentation which would sometimes fail the test of relevance in a modern court; this has to be explained. Notwithstanding the fact that ancient sources mention

a (legal or quasi-legal) rule of relevance,[7] namely the requirement that litigants ought to speak to the point, both parties proceeded to an apparently liberal use of extra-legal argumentation and (to modern eyes) irrelevant material.[8] But did the Athenians actually assess this material as irrelevant?

Modern scholars offer differing interpretations of the apparent readiness of the Athenians to accept 'irrelevant' material in their courtrooms and have reached divergent conclusions as to the overall aims of the Athenian system of justice. These interpretations are influenced by the significance that each researcher is willing to afford to this extra-legal material. One stream of scholarship attributes great weight to it and, as a result, finds the Athenians unwilling to strictly enforce the law in their courts. Since the Athenians permitted quasi-legal evidence to influence their verdicts (as proved by the continuous presence of such evidence in the speeches) the implementation of justice based on the strict enforcement of the letter of the law is undermined. Hence, each commentator questions the true role of the court and substitutes the obvious one of the adjudication of legal disputes and enforcement of law with alternative propositions.

Interpretations and proposals of this stream range from decision making based on equity and fairness to achieve ad hoc and personal justice to the attainment of social order by channelling class feuding and socio-political contest for honour to an objective and acceptable non-violent arena. For instance, Cohen argues that the wide use of extra-legal argumentation (that would be considered as irrelevant in modern courts) and the invocation of notions such as patriotism and status or appeals to pity by litigants, suggest that the courts were formulated in such a way as to serve social and political ends.[9] Todd goes so far as to claim that, in Athens, law and politics were ultimately indistinguishable.[10] Lanni, slightly deviating from this approach, argues that the major aim of the Athenian courts was the attainment of equity and personal justice. Hence, the Athenians knowingly allowed for such a wide use of extra-legal argumentation, with the result that cases were judged on an ad hoc basis.[11] Osborne argues that the institutional framework of the Athenian legal system and the courts in particular aimed at the embodiment of the rule of the majority.[12]

Although this stream is correct to afford a noteworthy role to the wide use of extra-legal argumentation, they tend to underrate the commitment of the Athenians to the rule of law. In this approach, rules and procedures that promoted the strict enforcement of the law and proved the commitment of the Athenians to this ideal are systematically downplayed. However, careful analysis of the court speeches reveals that notions such as the Heliastic oath weighed far more than these researchers are willing to acknowledge. Relevance was also respected in the requirement to speak to the point, with the written plaint specifying the particular charges ('the point') that formed the accusation.[13] Features such as insistence on writing and penalisation of any reference by litigants to non-existent or unwritten laws, have to be taken into account. Such rules were not accidental and they prove that far more evidence than the wide use of (allegedly) irrelevant argumentation is needed in order to question the Athenian dicasteries' respect for the rule of law.

The other stream of scholarship, sometimes downplaying the significance of the wide use of extra-legal argumentation and character evidence in particular, insists on the attainment of the rule of law. Researchers like Ostwald and Sealey, building on the institutional and procedural framework of the Athenian legal system, argue that the Athenians had achieved the strict application of law.[14] Another trend in the same stream approaches this question by the close analysis of the surviving forensic speeches. So, for instance, Harris, Meyer-Laurin and Meinecke argue for the prominence of the rule of law, embodied in a strictly legal resolution of disputes.[15] Harris in particular, offering an idealised picture of Athenian adjudication, led his critics to observe that he refers to the extra-legal argumentation as 'stray comments reflecting only the amateurism and informality of the system'.[16] Nevertheless, the continuous and wide presence of character evidence in the delivered speeches makes it too obvious and noteworthy to be considered as a simple aberration from the norm of relevant legal argumentation.

This stream is correct to maintain that the Athenians were indeed committed to the rule of law. Nevertheless, the presence of extra-legal argumentation needs somehow to be explained, acknowledging its admittedly significant role in the speeches. Yes, the institutional framework, the procedures and the laws unequivocally aim at the attainment of the rule of law. However, comparing these factors *against* the wide presence of character evidence does not prove this point. In other words, the thesis is not entirely convincing in suggesting that the factors promoting the rule of law are put into a quantitative and qualitative comparison against those that may inhibit it, and the latter are found to prevail. Another, more articulate explanation is needed, a new thesis that reconciles these ostensibly antithetical features and finds an underlying homogeneous approach behind the Athenian attitudes to the rule of law and the relaxed rules of relevance.

This book bridges the gap and proposes a solution to the dichotomy between the above two streams of scholarship. It reveals that the rationale behind the wide use of character evidence conforms with the ideal of the rule of law, which was deeply rooted in the Athenian conscience. Therefore, this book belongs to the research trend which maintains that the Athenian courts sought to implement the rule of law (as the Athenians perceived it), yet it offers an original approach as to the *method* of proving this point. My view stands in general agreement with that of Herman who points out that 'Athenian litigants were not, as has traditionally been held, deliberately departing from the issue at hand . . . but conscientiously observing standards of relevance altogether different from ours'.[17]

This book aims to demonstrate, by focusing primarily (though not exclusively) on character evidence, the relevance of such argumentation to the issue at hand, by reference to issues such as:

i) what factors and characteristics of Greek life and of the Athenian legal system caused or facilitated the wide use of character evidence;
ii) what types of evidence the Athenians perceived as relevant to a legal case;

iii) how they argued such evidence and, ultimately
iv) why they perceived such argumentation as relevant and supportive of their notion of the rule of law.

The innovative deployment of the Greek ideas of character and personality, the Greek method of reasoning, and their application to the legal setting allow the deduction that *extensive reference to character evidence was received by the court as relevant to the legal case and served its quest for truth by assisting it to uncover the exact facts of a legal case*. Thus, in their view, the wide invocation of character evidence promoted the application of the written law without inhibiting the consistency and predictability of the court verdicts. In order to verify this hypothesis a series of secondary (though equally decisive) questions need to be asked and assumptions tested and verified.

Current scholarship and research hypotheses

This book aims to discover the primary reasons behind the Athenian liberal (by modern standards) approach to forensic argumentation. One of the most striking features of the Athenian courtroom speeches is, according to modern scholars, the litigants' readiness to resort to extra-legal argumentation, sometimes perceived as irrelevant to the legal charge. This has been interpreted in various ways depending on the focus, the background, and the aims of each researcher. What most of them share is the failure to avoid interpretations based on modern presuppositions; this is a flaw that this book aspires to avoid.

To offer but a few examples, Lanni discusses 'relevance' in the Athenian courts with the assumption that the notion of 'relevance' in modern western courts sets the standard against which the Athenian 'liberal' approach should be contrasted. The fact that the Athenians had such an approach (according to modern standards) is explained by the discovery of a covert role for the courts.[18] Harris stands at the opposite extreme and argues for an extreme legalism implemented by the participants of the legal system through the rigid application of the rule of law. Although he examines what the 'rule of law' meant for the ancient Greeks, he fails to liberate himself entirely from modern presuppositions as to the normative meaning of the 'rule of law', especially when this is applied to a pre-modern state.[19] Furthermore, sharing Lanni's presuppositions about 'relevance', he downplays extra-legal argumentation, referring to it as 'aberration from the norm' being a 'way of distracting the judges from the charges in the plaint'.[20] Rhodes has recently asserted that Athenian litigants actually spoke 'to the point'; however, he interprets the court speeches based on a 'modern' approach (i.e. whatever is 'logically relevant' and does not create 'exceptional prejudice'), thus omitting a technical examination of the issue by explaining what 'the point' is.[21] His conclusion may be criticised as subjective and arbitrary.[22]

My general point is that divergent interpretations offered by modern scholars share a set of 'normative' (though not uncontroversial) presuppositions which, by influencing their methodology, restrict any room for a reading of the speeches that

is as objective as possible.[23] This tendency recalls the effort of Athenian litigants who, although their way of reasoning and argumentation was restricted by the fact that they competed on a canvas painted by a common set of ethical norms, nonetheless highlighted (or ignored) different pieces of evidence or information, offering a subjective interpretation of the facts.

The first research hypothesis of this book is that the wide use of character evidence is the result of the socio-political structures, the psychology and the way of reasoning of the Greeks. In particular, the Athenians believed that this approach to argumentation was illuminative for the legal case and would *enable them to discover the facts and the truth*. Since most disputes in their courts were factual, a wide approach to character evidence and the presentation of contextual and background information facilitated them to uncover the true facts of the case. Subsequently, they could proceed to the application of the written law to these facts and, thus, the execution of legal justice. Therefore, psychological reasons largely instigated the wide use of character evidence in their argumentation which, by being a method that assisted the discovery of the truth, facilitated the implementation of the 'rule of law'. This hypothesis of interpreting the role of the courts as 'objective discoverers of truth' opposes the conclusions of modern researchers.[24]

The second research hypothesis is that this quest of the Athenian courts for the discovery of the truth was in truth facilitated and not obstructed by the wide use of character evidence. According to this assumption, the information that the courts received concerning the background and the wider context of a dispute was welcomed as directly relevant to the facts. This information, rather than widening the scope of the legal case so as to induce the jurors to vote in accordance with norms of equity and *epieikeia*,[25] actually assisted them to focus more on the innocence or guilt of the party in that particular case and thus to correctly apply the law.[26] By the same token, and always by reference to the Greek ideas of character and personality, litigants' reference to extra-legal material such as the harsh impact of an adverse verdict, citation of liturgies and advertisement of the litigants' adherence to (at first glance irrelevant) ethical norms of the community, acquire probative value.

The same conclusion applies to the third hypothesis of this book, which is an extension of the second so as to include emotional argumentation. For the Greeks, human emotions are cognitive processes, informed by beliefs, desires and reasoning. *Pathos* is taken to be 'rational' in the sense that it is based on a cognitive evaluation of a particular situation. The person, drawing on preconceived ethical beliefs and stereotypical assumptions instilled in him by the environment, reacts with a proper response, i.e. feels the proper emotion. Such a proper reaction on the part of the jurors was anticipated by litigants and reflected in their speeches. In other words, proper emotional responses (positive or negative) should be provoked in jurors by the argumentation of the litigants (with regard to the right persons, at the correct timing and context, for the right reason), triggering the appropriate reaction in the form of sentencing or acquittal. Emotional argumentation was therefore based on the legal argumentation and was always (allegedly)

coupled with justice. However, how certain can we be that the popular courts and their amateur audiences abided by these rules?

The above issues therefore bring to the fore the question of the competence of Athenian jurors. The common opinion regarding the direction of the Athenian courts can be summarised as: 'the popular and unprofessional nature of the jury much relaxed the need for logical, relevant treatment of points of law and increased the opportunities for irrelevant, but brilliant digressions and emotional appeal'.[27] Others prefer a more balanced view, arguing that

> their verdicts might be coloured by factors outside the issue; they might, for instance, decide to temper strict justice with mercy if a defendant's past life warranted it; they might allow the prejudices of the moment on occasion to override reason, as of course modern juries sometimes do. But ultimately their courts were intended to arrive at just decisions; decisions based on the laws; decisions primarily on matters of fact; decisions on specific cases which came before them.[28]

On the other hand, researchers believing in an Athenian rule of law make a more convincing case. Harris for instance, refers to the whole range of procedures and factors that secured a high level of sophistication for the Athenian legal system. He surely cannot be blamed for stating that 'modern scholars (except those who believe in necromancy) cannot raise Athenian judges from the dead and ask them why they voted the way they did in a particular case'.[29] After all, as Gagarin observes (referring to scholars who have uncritically accepted the picture of Philocleon as the stereotype of the Athenian juror)

> the accuracy of the portrayal can surely be doubted. There probably were jurors like Philocleon voting on actual cases, but that these constituted the majority or even a large minority of jurors is doubtful. If they had, the Athenian legal system could hardly have survived long.[30]

So, the fourth hypothesis of this book is that Athenian jurors had a high degree of competence and experience. They judged human action in perfectly rational and nearly objective terms and it may be safely concluded that they formed one of the most qualified popular audiences of recorded history.[31] This will be proved in the course of this book by reference to the Greek ideas of character, ethical motivation and practical reasoning and the way that these provided a model of (nearly objective) interpretation of human action.

This fact contributed towards the achievement of a relative amount of consistency and predictability of court verdicts rather than decision making on an ad hoc basis.[32] This is yet another hypothesis supported by this book. Lanni focuses on the pragmatic difficulties of the period such as the sparse documentation for cases kept in the Metroon, and on legal issues such as the absence of a binding *ratio decidendi* and the limited discussion of precedents in the forensic speeches. However, notwithstanding the genuine difficulties

in reaching a safe conclusion on the matter, there are some factors which are decisive on the balance of probabilities. These have been addressed by Harris[33] and include:

i) the fact that in legal disputes before the Athenian courts, there is a targeted use of precedent (though most of the cases concern factual disputes rather than disputes about the meaning of the law);
ii) the correct estimate of the written and oral resources that could be used for the transmission of the rationale behind verdicts (so as to create a homogeneous approach in the future);
iii) other factors that could assist in reaching consistency such as a) the coherence offered by the references to the intent of the lawgiver and b) the interpretation of laws by reference to other statutes.

These served as homogenising factors and set the basic principles of the legal system, at the same time placing a framework and boundaries on the discretion of the judges. This book confirms and supplements the above conclusions. What is original is the methodology used in proving the degree of consistency and predictability of Athenian verdicts, which is based on a close analysis and theorisation of the litigants' rhetoric in accordance with Greek psychology.

In order for the court to be able to achieve consistency, a sub-hypothesis needs to be fulfilled, namely that rules of relevance had been developed. This again may be answered in the affirmative. In answering *how* we know that the Athenian courts had already developed a more or less sophisticated approach to relevance, three factors may be cited:

i) the requirement to 'speak to the point';
ii) the absence of complaints from the litigants as to what is relevant;
iii) the consistent patterns of argumentation throughout the approximately one century of our enquiry.

In deciding *what* is relevant for Athenian courts we may use the following reasoning. The evident loyalty of litigants to certain patterns of argumentation proves the relevance and success of these patterns as regards their reception by the court. It can safely be argued that this strategic and tactical consistency of forensic argumentation was accepted as valid and 'to the point' by jurors. This consistency of rhetorical approach to a legal case reveals an agreement of all parties as to what is relevant. To make it plain, all recurring arguments that emerge throughout the period of the Attic orators may be safely pronounced as relevant for the Athenians. Thus, we may infer from the speeches as a general rule that

i) any argument that was directly relevant to the legal case, the written law or the ethical norm enforced by that law and / or
ii) any argument that was relevant to the more general character trait that embraced this norm were received by the court as relevant.

So, having extracted the examples of what kind of argumentation found in the speeches is relevant, can we theorise and (re)construct the Athenian rules of relevance? In other words, can we answer the question *why* the ever-recurring patterns of argumentation (and especially extra-legal and character evidence that concern us here) were received as relevant? The Greek ideas of character and personality, as well as the Greek method of reasoning assist in understanding why the patterns of extra-legal argumentation found in the orators were considered as relevant by Athenian jurors. These factors may also assist in the comprehension of the rules of relevance in Athenian courts and explain the consistent approach of orators to character evidence. To these rules we may now turn, mainly by describing the rationale for the Athenian relaxed rules of relevance.

A litigant had to prove whether or not there was a breach of the law mentioned in the written plaint. The legal statute enjoyed unquestionable authority and it embodied (or, at least, was related to) a communal ethical norm. The central issue to be proved by the invocation of character evidence was a litigant's general adherence or not to that norm. This, in turn, would increase the probability of the parties' allegations as to the breach of the particular law embodying that norm. Following an inductive way of reasoning (and taking into account the, for the Greeks, relative unity of virtue or vice), adherence to this particular norm revealed the possession of the related, more general character trait. Hence, by reference to a multitude of remotely or closely relevant examples of past acts, a litigant aimed at proving the possession of the related general character trait. Subsequently, by deduction, the possession of this trait would prove his adherence to the ethical norm, thus making adherence to the law which formalised it more likely. Irrelevant argumentation would have been the most serious impediment to the achievement of consistency and could have led to ad hoc judgments based on the particularities of each case; but this did not happen (at least to a degree that would incur the reaction of the Athenians, since such argumentation is entirely absent from the speeches). Relevance was not a black hole. Athenian forensic rhetoric, in close proximity with their ideas of character, had developed its rules of relevance which were apparently accepted and substantiated by the courts.

The above conclusion, that the Athenians had developed their rules of relevance, is subject to reservations such as:

i) the uncertainty as to the existence of a written, formal rule of relevance that one ought to speak to the point;
ii) the absence of trained personnel and formal procedures to direct the jurors as to what is relevant and to enforce the rules of relevance;
iii) the rough edges and subjectivity as to the boundaries of which ethical norms are or are not included in a general character trait.

Nonetheless, the relatively limited number of complaints (mainly of rhetorical value), as to the other party's abuse of the rule of relevance, provide a significant argument in support of our hypothesis. Thus, the fact that the Athenian courts were

staffed by an amateur personnel (albeit of high quality and experience), and the development of at least relatively concrete and clear rules of relevance contribute to the central hypothesis that the Athenian approach to character evidence did not obstruct consistency and predictability of verdicts.

Another assumption of this book is that Athenian laws had a substantive orientation. Siding with Harris[34] in that respect, it is maintained that Athenian laws were very much concerned with directing human conduct and setting standards of behaviour. Nonetheless, although Athenian statutes were not overwhelmingly concerned with procedure,[35] the creation of a mechanism for the settlement of disputes was undoubtedly an equally significant aspect of the Athenian (and Greek) judicial process from the archaic period. Harris, in order to prove the substantive orientation of Athenian laws, examines the wording of a number of statutes that were primarily concerned with substantive issues. This book aims to add to his findings by examining the rhetoric of litigants and their insistence (in accordance with Greek ideas of personality) on presenting themselves as ethical adherents of the ethical beliefs of the community. The fact that Athenian laws encompassed and legally enforced a wider ethical norm of the polis means that when Athenian jurors decided a legal case, the letter of a specific law was applied but a wider ethical norm was reinforced. This was the essence of the legal enforcement of morals in classical Athens, namely the reinforcement of the wider ethical norm through the enactment and enforcement of a particular law. In this way the court, apart from its primary task of implementing the rule of law by applying specific laws to particular legal cases, acted also as the moral educator of the polis in the absence of an official public system of education, strengthening thus the substantive orientation of the laws.

A further hypothesis focuses on the Greek ideas of character. Contrary to the conclusion of some researchers[36] the Greeks did not hold a firm and universal belief in a stable and unchanging human character. Close examination of Greek perceptions and ideas reveals a highly flexible approach to the issue and an uncertainty as to the stability of *ethos*. This has important implications for the method of argumentation in forensic fora as to the width and content of character evidence offered by litigants. The uncertainty as to the unchanging nature of human character allowed them to offer lengthy accounts of previous acts of varied proximity to the legal case (though in accordance with the rules of relevance described above) in order to convince the jurors of the truth of their presented facts. Furthermore, such a lengthy account of their positive character traits (and the opponent's negative ones) was intended to increase their credibility in a setting that relied heavily and almost exclusively on the litigants' rhetoric. The enormous significance afforded to words in the Athenian legal setting led to the gradual development of a scattered and loose approach to argumentation into a finely formed art of rhetoric.

This brings us to the last hypothesis of this book which takes a dynamic, not a static, view of Athenian litigation, especially in relation to forensic rhetoric and argumentation. The first chapter fulfils that aim by offering a historical overview

of rhetorical argumentation from Homer onwards. It includes a search for the origins of argumentation in general and of character evidence in particular, combined with background information about the nature of litigation in the period before the Attic orators. Development of rules of rhetoric from an embryonic stage, gradually led to their consolidation into an art to be found in the courts of classical Athens. By this time, the art of rhetoric had reached its climax, the methods and tactics of argumentation had been clarified, and consistent patterns had emerged.

Setting the context

Relevant characteristics of the ancient Greek world

In order to discover the underlying reasons behind this Athenian (and Greek) approach to argumentation, it would be useful to address a series of questions relating to the unique features of this civilisation. What are the main features that might have influenced their attitude to argumentation in general and character evidence in the courts in particular?

The socio-political structures of the newly formed polis, which originally was a weak state, influenced the Greek ideas of 'character' and 'personality',[37] placing the interests of the community to the fore. The individual and the *oikos*, in an era of groundbreaking changes, gradually conceded their hereditary powers to the polis and increasingly depended on the public institutions. Realities such as the invention of writing, the novel hoplite warfare and the more objective and impersonal legal procedures, posed new challenges for the subjects. The ancient 'person' thinking of himself as a constituent of the community rather than a subject to be protected from the intrusion of an impersonal Leviathan-state, wholeheartedly devoted himself to the community and adhered to the ethical norms of the polis.

Philosophical enquiries also played a significant role in the formation of these ideas and the resulting wide use of character evidence. The inductive and deductive method of reasoning provided for the extraction of grounded conclusions based on a multitude of examples. The fact that the Greeks did not acknowledge the person's ethical autonomy of action in every single instance of his life[38] means that any act should be considered in connection and in conjunction with the rest, resulting in the extraction of a coherent set of character traits. For example, a particular deed could not have happened by chance but was indicative of the agent's character. A systematic demonstration of public expenditure in the form of lavish liturgies proved by induction the possession of the more general character trait of magnanimity. Then, by deduction, this magnanimous person was considered a philopolis who was unlikely to have breached the laws and norms of his community. Furthermore, the idea that the emotions are rational processes based on preconceived experiences and beliefs allowed for a coherent interpretation of human behaviour and an attribution of blame or merit without asterisks and exclusions (such as 'acting irrationally in the grip of emotion').

The Athenian legal system

Demonstration of the characteristics of the Athenian legal system that influenced their approach to character evidence is necessary in order to set the context of the current study. Although these will be discussed in detail in Chapter 2, it is useful to sketch here the limits they set and their implications.

The system of justice of the first direct (and radical) democracy demonstrates the Athenian commitment to political egalitarianism and the effort to combine this with the rule of law. The democratic nature of the system was based on two pillars:

i) amateurism, staffing every office by sortition from the qualified male Athenian citizens, and
ii) popular trials, providing for decision making by popular vote in panels ranging from 201 voters up to six thousand.

The pervasive ideology of amateurism (with more or less significant detours from this rule, such as the presence of logographers) though instigating a strong adversarial atmosphere, allowed for a less bureaucratic but more flexible and comprehensible approach to justice.

These features have significant implications for forensic rhetoric. The lack of professionals signified the need for self-regulation. In such a context, due to the absence of strict and formal enforcement mechanisms, rules of relevance may be relaxed and argumentation in the courts may be controlled only by the uproar of the jurors. The amateur litigants were careful not to reveal the professional touches of the logographers and insisted on the human tendency to storytelling, reminiscent of everyday conversation. The fierce adversarial contests occasionally resulted in name-calling and similar methods of blackening the opponent. The Athenian legal system's structures, procedures and laws facilitated the wide use of character evidence. These will be discussed in more detail in Chapter 2.

Comparators

The above discussion touches upon the differences between ancient and modern approaches to 'character' and 'personality' and the resulting, striking, dissimilarities between the Athenian and modern legal systems. Although this is not a comparative work, comparators are sometimes useful in order to define relevant terminology, emphasise key points and demonstrate the rationale behind the Athenian practices.

The first comparison is between ancient and modern conceptions of 'character' and 'personhood'. Opposing definitions of these notions[39] give rise to different approaches to forensic argumentation (e.g. a more liberal or stricter approach to character evidence) and, in turn, diverse explanations and interpretations of this fact. Disregard of the dissimilar structures of these two eras (the modern industrial, impersonal state compared to the ancient polis) may lead to misunderstandings as to their influence on various fields of human life. Modern presuppositions about

these concepts tend to take an unjustified normative force. By the same token, the Greeks' more liberal approach to extra-legal argumentation leads scholars to reach conclusions about their attainment (or the lack of it) of concepts that are, to this day, controversial and problematic, such as the 'rule of law' or 'relevance'. These concepts, as we understand them today, are influenced by modern ideas such as the individualistic conception of 'personhood', the individual's autonomy against a repressive sovereign or exclusively modern conditions such as the need for individual rights against impersonal bureaucratic states. Therefore, the rules of relevance or the rule of law in the Athenian context need to be conditioned by the above reservations and treated on their own merits.

A comparison that is occasionally used in this book is between the Athenian legal system and those of the Western capitalist democratic states, especially the Anglo-American ones. This comparison highlights the different lines that may be followed in order to reach similar goals, such as the rule of law and democracy. Nevertheless, the aims and the procedures of these legal systems are not taken as normative examples. On the contrary, in the course of this study it is demonstrated that definitions and interpretations of key notions may differ and call for fresh examination. For instance, yes, the Greeks had certainly developed a sophisticated notion of the 'rule of law' to which they strongly adhered. Nevertheless, their notion of the 'rule of law' was unique and in many ways distinct from its modern counterpart. Therefore, any classification of the Athenian legal system as 'rule of law based' or 'equity based' is unjustified, unless these terms are clearly defined and given their contextual meaning. It is maintained throughout this book that the legal system of the classical Athenian democracy provides a noteworthy, comprehensive example of a different (though equally valid) approach to justice based on the rule of law.

The aforementioned normative force that is sometimes attributed to modern legal systems when compared to the Athenian, obstructs the objective application and interpretation of the evidence. This approach, aggravated by the idealistic view of some modern scholars as to the nature of modern systems, exaggerates the 'otherness' of Athenian law.[40] Nevertheless, a more realistic line followed by scholars and personnel who are actual practitioners or who work more closely with the law[41] illuminates the inefficacies of modern systems and exposes questions that still remain problematic; these are not too remote from the ones asked in the Athenian courts. The advantages and disadvantages of the adversarial mode of trial as opposed to a more inquisitorial approach, the democratic or elitist approach to law, and the competence of laymen to decide on questions of fact in a responsible manner, are recurrent themes that chronologically originate in classical Athens. Therefore, the Athenian approach to character evidence can deepen our understanding of the key, knotty questions which have deep roots, reaching to the emergence of court systems.[42]

Changes in the adversarial character of the Commonwealth legal systems have been proposed in the course of the previous century and still persist.[43] The 'legal laissez-faire'[44] heavily influenced the method of attaining the 'truth' in a courtroom; the adversarial mode of trials (or 'fight' theory) found many supporters in

the assumption that the 'fight' theory and the 'truth' theory coincide.[45] However, is it really an objective of a common law hearing to discover the truth or merely to decide on the cases presented by the parties?[46] According to the distinguished legal historian Vinogradoff, an ancient trial 'was not much more than a formally regulated struggle between the parties in which the judges had to act more as umpires and wardens of order and fair play than as investigators of truth'.[47] In the course of this book it will be unequivocally demonstrated that this statement is far from accurate in the Athenian context. The Athenian courts were overwhelmingly interested in the attainment of truth; yet the fact that lawyers view modern adversarial systems in such terms legitimises the comparison.

The exclusionary or inclusionary approach to the admissibility of character evidence in particular touches upon the democratic or elitist nature of the system. Firm disbelief in the laymen's (fact-finders') capacity to discipline themselves in deciding on the relevant issues of a case has caused a restrictive approach to the admissibility of evidence. This exclusionary approach is far from unanimously accepted (since it arguably creates more problems than it solves),[48] thus generating calls for a more liberal and inclusionary attitude.[49] Distrust in the competence of jurors leads to the withholding of evidence, which in turn promotes an elitist approach to justice by creating a self-regulating and maybe unchecked legal bureaucracy. This encapsulates the real danger of broadening the gap and alienating the general public from the workings of justice. With this in mind, comparison with the extreme Athenian opposite (namely that of a highly inclusive and democratic legal system) is necessary.

The above themes set the axes within which the limited but targeted comparison will take place throughout this study. Although at times such thematic comparison may be viewed as arbitrary and random, the complete picture will slowly emerge. By avoiding anachronistic value-judgments and unnecessary modern presuppositions it will be made plain that the existence of a highly democratic and citizen-friendly legal system is achievable, provided that the laymen participants are properly educated through experience and that each person is assigned a clearly designated role. Modern methods of fact-finding ease the burden and smoothe the inequalities between the parties, while the rationalisation and codification of the relevant rules of evidence assist in the objective and efficient conduct of trials, avoiding agonistic demonstrations. As a result, it will be demonstrated that a legal system's adversarial character and the quest for truth may not be mutually exclusive.

Collection of data

The basic source of evidence is the canon of the ten Attic orators (the approximately one hundred surviving forensic speeches).[50] The chronology of these refers to more than a century ranging from approximately 420 BC to the 320s BC,[51] albeit not uniformly distributed. Before proceeding to the main points of discussion, there are some important general considerations, concerning the uncertainties surrounding the material, that have to be taken into account.

First there cannot be any certainty about the number of surviving speeches that were actually delivered in court. Some of them were rhetorical exercises and, fortunately, these can more or less be identified. However, even when there is certainty (to a degree) that a speech was written and delivered in court, ambiguity still remains as to the extent of revision between delivery and publication.[52] This process of alteration had three stages: the first being the actual delivery in the courtroom, the second being the revision by the orator and the third the publication and also the transmission (with mistakes) by copyists through the centuries. Written speeches were the models upon which litigation was based; nonetheless, oral delivery surely entails minor detours from the script. Apart from the linguistic detours, actual speeches also contained non-scripted, extemporaneous elements[53] that do not appear in the texts but would be extremely useful in the picturing of characters. Other omissions include the failure, generally, to incorporate the actual texts of the laws and decrees, as well as the testimonies of witnesses.

Regarding the second stage, namely the revision of the text before publication, this seems less puzzling. First, such a revision, whatever its extent and if existed at all, gives us an account of the best and most refined argumentation that the speechwriter could offer, including evidence from character. This is a good indication of what argumentation concerning character ought to be used and would have appealed most to an Athenian jury. Second, although the revision need not be uniform, there is no way to discover whether one speechwriter revised his speeches more than another or whether the speeches of a defendant or of a public suit were altered more than corresponding ones from a prosecutor or a private trial. Thus, there is no choice but to analyse what is present in the texts, not what might have actually been said in court. Without overestimating the difficulties posed by the evidence, caution should still be used in its treatment.

The structure

As mentioned above, this study explores the multidimensional influences, causes and aims of the wide use of character evidence in the Athenian court system. Chapter 1 finds the beginning of the thread whose end reaches the Athenian rhetoric of the fourth century. The identification of similarities between classical age's forensic argumentation and archaic dispute resolution provides the first step towards the conclusion that the causes of the liberal approach to rules of relevance have to be sought in the distant past. Travelling through these four centuries and highlighting the groundbreaking developments that took place assist in locating the use of character evidence in their temporal context. The progressive emergence of the polis-state and its legal system, in spite of altering the orientation and aims of Athenian law (from equitable arbitration to the rule of law), left the broad approach to argumentation from character almost intact. This fact is stimulating and needs to be explained.

Chapter 2 acknowledges the (by modern standards) excessive reliance of the Athenian legal system on personal worthiness and merit, a factor that created

incentives to litigants and judges to place more weight on evidence from character. The structures, institutions, laws and procedures of the system provoked litigants to unfold even remotely relevant aspects of their personalities. The purposeful survival of this tendency from the archaic age, which provides yet another vote of confidence to this traditional practice, certified that for the classical Athenians, proper judicial process and the rule of law were best served by having such relaxed rules of relevance.

The first two chapters therefore set out the series of choices that the Athenians made and the socio-political context within which argumentation from character operated. The consistent presence of this wide approach to character evidence in divergent arenas of argumentation, its persistence down to the classical age, and its eventual formal endorsement by the advanced official legal system, prove that the origins of this practice were deeply rooted in the collective psyche. Chapter 1 demonstrates the presence of a similar approach to argumentation to that found in the Attic orators. This similar approach includes a wide use of character evidence which persisted until the late classical period. Chapter 2 proves that the Athenian legal system was designed in such a way as to endorse, allow and sometimes facilitate / trigger the wide use of character evidence. Although the Athenians were aware of alternative, stricter approaches to legal justice, and to some extent they followed these in relation to the court of Areopagus, they consciously chose to retain the liberal, public and open approach found in the archaic period. Why did this happen? This study maintains that the Athenians truly believed in the legal relevance of character evidence, thus they preserved a wide use of it in their courts. Even when remote to the legal case at hand, character evidence assisted the court in uncovering the true facts of a case and, subsequently, in applying the law to them. Thus, the wide use of character evidence conformed with the rule of law. Yet, why did the Athenians believe that character evidence was relevant? The next chapters answer this question.

Chapter 3 suggests that the causes for this phenomenon should not be solely sought in external forces such as the structures and the institutions of the Greek polis. These decisively influenced psychology and philosophical ideas and vice versa. This chapter explores the Greeks' ideas of character and proves that their beliefs are directly connected with their rhetorical practices. Unequivocal trust in the probative and predictive value of human *ethos* made character evidence an essential component of arguments from probability. On the other hand, uncertainty as to the fixed and unchanging nature of human character provoked the flexibility of argumentation evident in the speeches. The Greeks' inductive method of reasoning imbued the speeches with a series of examples from a man's past acts, a practice which was evidently expected by the audience. In other words, the Greek perceptions of human psychology decisively formed the content and the methods of character evidence.

Chapter 4 applies the conclusions of the previous chapter to the forensic speeches and explores the divergent methods and strategies that the rhetoricians used for the portrayal of character. Its aim is broader than the mere application of the conclusions of Chapter 3. A step further is taken towards a comprehensive

exploration of the litigants' tactics. At the same time, the rhetorical strategies and the wide invocation of character evidence are contrasted with modern Anglo-American approaches. Besides, this comparison offers a clearer insight into the socio-political background of the Athenian polis.

Chapter 5 returns to the investigation of Greek psychology. This time, not 'character' but 'personality' and 'human action' are analysed and contrasted with their modern counterparts. The need for a different approach is highlighted and the model of the 'objective – participant' person is applied as more suitable for the ancient context. This model provides that human mind and human action can be best understood and interpreted in objective terms, in contrast to the modern highly subjective approaches. The ethically participant (rather than individualistic) ancient person accepts and wholeheartedly adheres to the conventional ethical norms of his society. These ideas serve as adequate causes for the wide use of character evidence in all types of argumentation. When the facts are unknown, past deeds may be inferred from a person's typical method of reasoning, ethical motivation and action. Examples of past behaviour serve as proofs of this person's general adherence or non-adherence to the norms (and consequently laws) of the polis.

The final chapter answers some of the standard questions surrounding Athenian law by reference to this new model of interpretation of the Athenian speeches. Acknowledging the paramount influence of the ideas explored in the previous chapters, this chapter analyses the imminent, utilitarian effects of character evidence in the courts. The wide use of extra-legal argumentation neither hindered legal justice nor inhibited jurors' rational judgment. Examination of legalistic and rhetorical aims such as propensity, credibility and goodwill is necessary in order to prove the compatibility of this practice with the rule of law. Analysis of ancient beliefs about human emotions and their relation to rational decision making is required to demonstrate that *pathos* argumentation is not irreconcilable with straight judgment based on law. Once again, modern presuppositions may be disorienting and what contemporaries consider to be irrelevant argumentation may not be so after all.

Notes

1 Heraclitus, fr. 114. Tr. by Kahn (2004).
2 LSJ s.v. *ἦθος*, *δαίμων*.
3 Kahn (2004), p. 261.
4 See Heraclitus fr. B.32.
5 The Sisyphus Fragment (DK 88B.25) was traditionally attributed to Critias, though later research has shown that its authorship probably belongs to Euripides. Cf. Kahn (1997).
6 Heraclitus fr. B.67.
7 Arist. *Rhetoric* 1354a22–3; *Ath. Pol*. 67.1.
8 By the term 'extra-legal' I refer to the kind of argumentation that is not directly based on or referring to positive law. By this token, character evidence is considered as a form of extra-legal argumentation, though it clearly has a legal bearing in the sense of supporting the court (and the litigants) as regards the probability of essential facts in order for the legal case to be established.
9 Cohen (1995), Osborne (1985), Lanni (2006).

10 Todd (1993), p. 29.
11 See Lanni (2005), (2006); cf. Christ (1998), esp. pp. 41–2 and 195–6; Scafuro (1997), pp. 50−66.
12 See for example Osborne (1985).
13 Gagarin (2012).
14 Ostwald (1986), pp. 497–525; Sealey (1987), pp. 146−8.
15 Meyer-Laurin (1965), Meinecke (1971), Harris (2000).
16 Lanni (2005), p. 113.
17 Herman (2006), p. 149. However, I do not agree with the view that this 'observation of their standards of relevance' was a conscious departure from the issue at hand. On the contrary, I aim to demonstrate, by focusing primarily though not exclusively on character evidence, that it *did refer* to the issue at hand.
18 Lanni (2006) sees the Athenian popular court as an institution indifferent as to the application of the 'rule of law', which aimed at giving contextualised ad hoc decisions, thus settling disputes by taking into account wider notions of justice and equity rather than strictly applying objective rules in a consistent manner (thus disclosing her presuppositions as to what the 'rule of law' means); cf. Christ (1998) esp. pp. 41−3 and 196; for a different exegesis based on the same assumptions stressing the political dimension of the courts, see Todd (1993); the same pattern (search for an exegesis based on modern presuppositions) is valid for social anthropological studies such as Cohen (1995) and Ober (1989).
19 Harris, by concentrating on divergent aspects of the Athenian legal system which promoted a strict application of the law (such as the Heliastic oath, the written plaint, the prevalence of substance against procedure etc.), offers an account of the Athenian system based on modern – especially procedural – conditions for the attainment of the 'rule of law'. I acknowledge that Harris has offered many accounts as to what the 'rule of law' meant for the ancient Greeks though without, in my opinion, liberating himself from the normative presence of the modern 'rule of law'. My perception of his work is that by following a comparative account of the two legal cultures he places emphasis on the similarities (sometimes downgrading the differences) in order to present the Greek legal system as scarcely alien (or even a precursor) to the (normative) modern one. Nevertheless, I am not sure whether this can be a valid undertaking, since I do not believe that the two legal systems may be compared. The difference of structures, psychology and sociology precludes such a comparative study and this is one of the points that this study aims to prove.
20 Harris (2013b), p. 153.
21 Rhodes (2004); This is true for Griffith-Williams (2012), pp. 160−1.
22 For a criticism see Harris (2013b).
23 By 'objective' I mean a third-person reading, as far as possible closer to the ancient protagonists' perceptions.
24 The scholars who in one way or another have expressed reservations or denied the Athenian courts' upholding of the law and the discovery of truth include Cohen (1995) who sees them as institutions for pursuing personal feuds, Lanni (2006) and Christ (1998) who believe that the invocation of extra-legal material facilitated the rendering of ad hoc judgments and the jurors paid little attention to the letter of the law, Todd (1993) who overstates the political decision making of the courts at the expense of its legal role, and Ober (1989) who downplays the commitment of the courts to the attainment of truth and prefers to see them as institutions of social significance in facilitating the dialogue between the mass and the members of the elite.
25 On the role of *epieikeia* see Harris (2013a), pp. 274ff. According to him, when a litigant used an argument based on *epieikeia*, he was not asking the court to reject the written law but was demonstrating that his case was an exception to the general rule contained in a statute and that in his specific case, other legal considerations should take precedence.

26 Contra Lanni (2006), especially at pp. 46ff.
27 Kennedy (1963), p. 160.
28 Carey (1994).
29 Harris (2006), p. 179.
30 Gagarin (1994), p. 47.
31 This is true both as regards the popular courts and the court of the Areopagus. I do not share Lanni's (2006) view that these institutions had divergent approaches to justice.
32 Lanni (2004).
33 Harris (2007).
34 Harris (2009).
35 This position is taken for example by Ober (1989); Todd (1993); Gagarin (1986); Osborne (1985).
36 Lanni (2006), pp. 60–2, n. 92 is prominent among them.
37 I use the term 'personality' for the sake of convenience as the most practical way of conveying to the reader a familiar meaning she can grasp. The concept of 'personality' in classical Greece is a complex one and distinct from our own (as will be shown in Chapter 5). The question of whether the Greeks had a distinct word for the term 'personality' as a modern audience understands it depends on the meaning we attach to this word. With the potential meanings ranging from psyche to *ethos* and character, I prefer to retain the English word throughout and attach to it the meanings of i) how a person perceives herself in relation to the community, ii) how the individual interacts with herself during the decision-making process and iii) how the community perceives the 'person', the 'subject', the 'individual' as a distinct entity. All these complex notions are primarily related to modern philosophical considerations about 'individual personality' for which it is not clear that the Greeks ever really had a word.
38 Schopenhauer, A., *The Wisdom of Life*: 'Everyone believes himself a priori to be perfectly free, even in his individual actions, and thinks that at every moment he can commence another manner of life'; (2005) *On the Freedom of the Will*: 'You can do what you will, but in any given moment of your life you can will only one definite thing and absolutely nothing other than that one thing.' Oxford: Basil Blackwell.
39 Both 'character' and 'personhood' are central to the better understanding of the Athenians' approach to law in general and to character evidence in particular. Although definitions of these notions are far from indisputable, I take 'character' to mean the aggregate of behavioural traits as revealed by actions or habits that distinguish one person from another. In that sense 'character', apart from its internal denotation, also has external implications and returns to its original use as a mark engraved or impressed (upon a coin or seal), thus a distinctive mark or characteristic distinguishing one thing from another. 'Personhood' on the other hand refers to a unique conception of the individual self, the status of being a 'person', a 'human being' having certain capacities and attributes.
40 Cf. Gagarin (2003), p. 197.
41 E.g. the seminal book by Frank (1949).
42 For the persistence of these issues, and especially of the problem of character evidence see McEwan (2002), published shortly before the introduction of the Criminal Justice Act 2003: 'Although criticisms have regularly been directed at this area of the law, it is only recently that dissatisfaction has generated reformist zeal not only within the Law Commission, where it might be expected, but in political circles also.'
43 Apart from the reformist zeal in England and Wales, one can also consult Discussion Paper 62, Sydney: 1999 of the Australian Law Reform Commission on the adversarial – non-adversarial debate.
44 Frank (1949), ch. 6: 'The legal laissez-faire assumes that, in a law suit, each litigious man, in the courtroom competitive strife, will through his lawyer, intelligently and energetically try to use the evidential resources to bring out the evidence favourable to him and unfavourable to his courtroom competitor; that thereby the trial court will obtain all the available relevant evidence; and that thus, in a socially beneficial way,

the court will apply the social policies embodied in the legal rules to the actual facts, avoiding the application of those rules to a mistaken version of the facts.'

45 Frank (1949): 'They think that the best way for a court to discover the facts in a suit is to have each side strive as hard as it can, in a keenly partisan spirit, to bring to the court's attention the evidence favourable to that side.'

46 Jolowicz (1996).

47 Vinogradoff (1920), at p. 348, paved a way to be followed by many [e.g. Cohen (1995)] in the interpretation of ancient legal systems.

48 E.g. McEwan (2002), pp. 190–1.

49 See for example McEwan (2007), p. 188 n. 4.

50 Ober (1989) conveniently offers a list of the speeches delivered before the Courts, the Boule, and the Assembly.

51 Hansen (1991), finds the earliest speech (Ant. 6) to be written in 419/18 BC and the latest (Dem. 56) in 322.

52 For the revision of speeches, see Dover (1968); Usher (1976); Johnstone (1999); Todd (1993), p. 37.

53 Johnstone (1999), p. 12.

References

AUSTRALIAN LAW REFORM COMMISSION, Discussion Paper 62: Review of the Federal Civil Justice System. Sydney: 1999, full text available at http://www.austlii.edu.au/au/other/alrc/publications/dp/62/ch2.html#Heading6 (no longer available).

CAREY C. (1994), 'Legal Space in Classical Athens', *Greece & Rome*, Vol. xli, No. 2, October 1994, 172−86.

CHRIST M.R. (1998), *The Litigious Athenian*, Baltimore: Johns Hopkins University Press.

COHEN D. (1995), *Law, Violence, and Community in Classical Athens*, Cambridge: Cambridge University Press.

DOVER K.J. (1968), *Lysias and the Corpus Lysiacum*, Berkeley: University of California Press.

FRANK J. (1949), *Courts on Trial: myth and reality in American justice*, Princeton, N.J.: Princeton University Press.

GAGARIN M. (1986), *Early Greek Law*, Berkeley: University of California Press.

——— (1994), 'Probability and Persuasion: Plato and early Greek Rhetoric', in Ian Worthington (ed.), *Persuasion: Greek Rhetoric in Action*, London: Routledge, 46−68.

——— (2003), 'Telling Stories in Athenian Law', *Transactions of the American Philological Association*, Volume 133, Number 2, Autumn 2003, 197−207.

——— (2012), 'Law, Politics, and the Question of Relevance in the Case *On the Crown*', *Classical Antiquity*, Vol. 31, Issue 2, 293−314.

GRIFFITH-WILLIAMS B. (2012), '*Oikos*, Family Feuds and Funerals: Argumentation and Evidence in Athenian Inheritance Disputes', *Classical Quarterly* 62.1 145–62.

HANSEN M.H. (1991), *The Athenian Democracy in the Age of Demosthenes: structure, principles, and ideology*, Oxford, Blackwell.

HARRIS E.M. (2000), 'Open Texture in Athenian Law', *Dike*, 3, 27−79.

——— (2006), 'The Rule of Law in Athenian Democracy: Reflections on the Judicial Oath', *Dike*, 9, 157–81 (= Etica e politica 9 [2007], 55−74).

——— (2007) 'Did the Athenian Courts Attempt to Achieve Consistency? Oral Tradition and Written Records in the Athenian Administration of Justice', in C. Cooper (ed.), *Politics of Orality*, Leiden: Brill. 343−70.

——— (2009), 'What are the Laws of Athens About? Substance and Procedure in Athenian Statutes', *Dike*, 12/13, 2009/2010, 5−68.

——— (2013a), *The Rule of Law in Action in Democratic Athens,* Oxford: Oxford University Press.
——— (2013b), 'The Plaint in Athenian Law and Legal Procedure', in Michele Faraguna (ed.), *Archives and archival documents in ancient societies: Legal documents in ancient societies IV, Trieste 30 September – 1 October 2011*, Trieste, EUT Edizioni Università di Trieste, 2013, 143−62.
HERMAN G. (2006), *Morality and Behaviour in Democratic Athens,* Cambridge: Cambridge University Press.
JOHNSTONE S. (1999), *Disputes and Democracy: The Consequences of Litigation in Ancient Athens*, Austin, TX: University of Texas Press.
JOLOWICZ J. (1996), 'The Woolf Report and the Adversary System', 15 *Civil Justice Quarterly* 198.
KAHN C.H. (1997), 'Greek Religion and Philosophy in the Sisyphus Fragment', *Phronesis* 42.3, 247−62.
——— (2004), *The Art and Thought of Heraclitus*, Cambridge: Cambridge University Press.
KENNEDY G. (1963), *The Art of Persuasion in Greece*, London: Routledge and Kegan Paul.
LANNI A. (2004), 'Arguing from "Precedent": Modern Perspectives on Athenian Practice', in E.M. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, 159−71, London: Duckworth.
——— (2005), 'Relevance in Athenian Courts', in the *Cambridge Companion to Ancient Greek Law*, 112−28, Cambridge: Cambridge University Press.
——— (2006), *Law and Justice in the Courts of Classical Athens*, Cambridge: Cambridge University Press.
McEWAN J. (2002), 'Previous Misconduct at the Crossroads: Which "Way Ahead"?', *Criminal Law Review* 180, 180−91.
——— (2007), 'Reasoning, Relevance and Law Reform: the Influence of Empirical Research on Criminal Adjudication' in P. Roberts and M. Redmayne (eds) *Innovations in Evidence and Proof*, 187−218, Bloomsbury Publishing plc.
MEINECKE J. (1971), 'Gesetzesinterpretation und Gesetzesanwendung im Attischen Zivilprozess', *Revue Internationale des Droits de l'Antiquite* 18, 275−360.
MEYER-LAURIN H. (1965), *Gesetz und Billigkeit im Attischen Prozess*, Weimar: Gräzistische Abhandlungen.
OBER J. (1989), *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People*, Princeton, N.J.: Princeton University Press.
OSBORNE R. (1985), 'Law in Action in Classical Athens', *Journal of Hellenic Studies* 105, 40−58.
OSTWALD M. (1986), *From Popular Sovereignty to the Sovereignty of Law: Law, Society, and Politics in Fifth-century Athens*, Berkeley: University of California Press.
RHODES P.J. (2004), 'Keeping to the Point', in E.M. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, 137−58, London: Duckworth.
SCAFURO A.C. (1997), *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy*, Cambridge: Cambridge University Press.
SCHOPENHAUER, A. (1901), *The Wisdom of Life and Other Essays*, New York; London: Dunne.
——— (2005), *Essay on the Freedom of the Will*, Dover Publications Inc.
SEALEY R. (1987), *The Athenian Republic: Democracy or the Rule of Law*, University Park: Pennsylvania State University Press.
TODD S.C. (1993), *The Shape of Athenian Law*, Oxford: Clarendon Press.
USHER S. (1976), 'Lysias and his Clients', *GRBS*, XVII (1976), 31−40.
VINOGRADOFF P. (1920), *Outlines of Historical Jurisprudence*, London: Oxford University Press, 1920−2.

1 The archaic origins of character evidence

From Homer to Classical Athens

The underlying rationale of this chapter emerges from the fact that most researchers isolate and examine the (admittedly better attested) more recent picture of forensic rhetoric found in the Athenian courts of the late fifth and fourth centuries. This book offers an additional, historical perspective, rendering references to rhetoric found in other literary sources and in earlier periods unavoidable. The current chapter offers a historical background to the theme of character evidence and illuminates the sequence of changes that took place in the field of rhetoric before the age of the Attic orators. Developments taking place in the archaic period, such as the transformation of dispute-settlement procedures, the development of instinctive argumentation to an art (rhetoric), and the codification of oral rules after the re-invention of writing, form the basis of a better understanding of later issues of Athenian law. The Athenian legal system (and the wide presence of character evidence in particular) needs to be examined from a holistic point of view, as a living organism which evolved for centuries.

This chapter proves that the wide (to modern perception) use of character evidence in Athenian courts is a tendency surviving from the (broadly defined) Greek administration of justice of the archaic period.[1] This tendency is also to be found in Greek literature, in non-forensic settings, therefore an all-embracing explanation for this phenomenon needs to be offered. Undoubtedly, in a pre-judicial or proto-judicial form of adjudication, one cannot expect coherent rules regulating legal argumentation. Subsequent to the dismissal of self-help as a defensible method of performing justice (though its remnants survived down to the classical age),[2] the emergence of arbitration as a form of dispute-settlement favoured the adversaries' natural tendency to storytelling.[3] An integral aspect of this is the positive portrayal of parties' characters, supporting their effort to gain the goodwill of the arbitrator, enhancing their credibility and, thus, the plausibility of their story.

Also, the public character of these early legal systems,[4] where disputes arose among members of a small-scale society and were decided openly in the agora, may have supported the emergence of public opinion as an important factor to be taken into account. Litigants, apart from merely mentioning the facts of a (in legal terms) loosely defined dispute, were probably obliged to win the approval not only of the judge(s) but also of the audience. Lacking the assistance of modern science in the gathering of evidence, the believability of a story was usually based

on controversial facts augmented by the positive portrayal of the litigant's *ethos* (character). The presence of spectators had important implications for the judges' decisions and the way a dispute ended.

Therefore, if this line of thought is correct, traces of this tendency to extra-legal argumentation are to be found in texts surviving from the archaic period. However, the claim that such wide use of character evidence was born in an environment of arbitration, favouring equity and reconciliation, does not mean that this was the environment in fourth century Athens. On the contrary, the fact that argumentation retained its basic features despite the transformation of the legal system calls for a plausible explanation. This is to be found in the Greek ideas of character and personality. In the fifth and fourth centuries, the separation of the legal from the quasi-legal sphere (each serving a different aim, enforcing written law in courts and equity in out of court arbitration) and the more elaborate context (a belief in the rule of law and the legal norms' gradual acquisition of substance) could have diminished the effects and thus limited the use of extra-legal argumentation; nonetheless its persistence is stimulating and must be examined.

In order for these points to be proved, namely of the existence of this wide use of character evidence in archaic Greece, the literature of this period will be examined, concentrating on argumentation from character during the settlement of disputes. Direct evidence is sometimes slim and, since persuasive speech can take many forms depending on its purpose, I will examine the developments in argumentation and the role of character in general. Moreover, indirect evidence will be provided by examining other remnants of rhetoric from the archaic period. Finally, legal remnants of the archaic system of justice which survived to the classical one will be used as circumstantial evidence. Norms and rules found during that period in an embryonic state were later developed and codified. The process of transformation of oral (mainly procedural) rules into written (gradually substantive) laws,[5] may have produced an alternative approach to justice (from arbitration by potentially arbitrary magistrates to a court system based on the rule of law), with serious implications for the legal system as a whole. Within that context, it can be suggested that the Athenian courts' rule of relevance that litigants ought to 'speak to the point' is also a remnant of the past, an oral requirement of the archaic age, which was later codified and substantiated.

In this world of change, the amateurism and openness of the early legal system remained intact, being products of the polis as a political organisation and not products of the later democracy (though they may be appreciated as its seeds). Although the unusually large for a polis territory of Attica and the rise of its population challenged the idea of 'personal justice' carried forward from the previous face-to-face community, nonetheless, the continued belief in this kind of justice based on familiarity (cf. Aristotle *Politics* 1326b) promoted the wide use of character evidence in Athenian courts. Persuasion of public opinion became more important than ever with the creation of mass jury courts. The need for an art of persuasion taught by professional experts became more evident, as did the need for professional speechwriters. However, the framework and the aims of rhetoric remained intact. Persuasion through the invocation of one's good character and

meritorious personality was the rule in this adversarial and agonistic environment. Denigration of opponents, maximisation of credibility, and intense effort to gain the goodwill of mass juries constituted important components of argumentation in Athenian courts.

On the other hand, the authority of written law and the procedural limitations on litigants and jurors alike, transformed the system and established the courts as guardians of the laws. These new realities and the increasing rationalisation and codification of legal rules brought about a progressive attainment of a degree of consistency and predictability in the legal system. The gradual emergence of rhetoric as an art and of patterns of ad hominem argumentation provided guidelines, at least for the practical and utilitarian implementation of rules of 'relevance', which were possibly developed through the archaic period and were infused into the classical Athenian courtrooms.

The origins of character evidence in Homer

Traces of the art of rhetoric[6] are to be found in Homer.[7] Odysseus had the ability 'to speak lies like truth' (*Od.* 19.203), exploiting a subsequently defined trick, specifically the accumulation of wealth of circumstantial detail, making the whole thing seem too complicated to have been invented.[8] A similar technique, either to conceal a lie or to enhance the verisimilitude of a story, was used in later years to make the weaker argument defeat the stronger or to support a case in Athenian courts.[9] A passage from Aeschines is enlightening:

> When the other boasters tell lies, they try to make their speech vague and imprecise because they are afraid of being disproved, but whenever Demosthenes boasts, first he tells his lies under oath, conjuring destruction upon himself; second, he dares to tell what he knows will never happen and actually calculates the time when it will happen, and he tells the names of people whose bodies he has not seen, deceiving his audience and imitating those who tell the truth (Aesch. 3.99).

Dionysius of Halicarnassus identified this device as one of the main virtues in persuasive speech, 'a power of conveying the things about which one speaks to the senses of the audience' (Dion. Hal. *Lys.* 7), explaining that it is achieved by a grasp of circumstantial detail.[10] Similarly, when Lysias gives a detailed description of a trial under the Thirty (Lys. 12.37), he offers a vivid narrative of their brutal character following the path of his archaic predecessor. He describes their cruelty in detail, exemplified by their not refraining from taking 'even the earrings of a woman [Polemarchus' wife] who had been wearing them when she entered his house for the first time – that is, on the day of their wedding' (12.19). Apart from merely enhancing the verisimilitude of his arguments and reaching an emotional climax, Lysias also walks on the footpath that Homer first opened.

Appeals to emotion are far from infrequent in Homer.[11] Securing the goodwill of one's hearers is sought after, through words of praise and through the

demonstration of a well disposed and sympathetic character. The effort for the appeasement of Achilles' wrath in Book 9 of the *Iliad* is shouldered by Odysseus, Phoenix and Ajax. These ambassadors had been chosen for their potential influence on the hearer. Indeed, Achilles acknowledges (*Il*. 9.198) that they are the men he loves most.[12] In sharp contrast, Achilles, disregarding Odysseus' emotional appeals, rejects Agamemnon's offers on the basis of the latter's untrustworthiness, based on his previous acts that reveal his general disposition (esp. 9.373-378).[13] Phoenix takes over, reminding Achilles of his past acts and his affection since his early life, in an effort to re-establish their personal relationship. Such a technique of enumerating previous beneficial acts is also familiar in later orators. Phoenix's use of Meleager's story,[14] analogous to the use of later orators' 'examples', acts as argumentation from precedent in order to convince Achilles of the soundness of his advice. Finally, Ajax experiments with the technique of indirectly addressing one's target by talking to another person (here Odysseus) saying essentially 'let's go home – we are wasting our time'. Then, directly addressing Achilles he offers a protestation of love and honour from his friends. Although Achilles is not convinced to set his wrath aside, a little deviation from his original position is achieved.[15]

Homer also offers direct examples of argumentation during settlement of disputes, though in a proto-legal, pre-court society. Notwithstanding these reservations, he offers extremely valuable evidence about the existence and use of rhetoric in archaic Greece, especially about types of argumentation during conflict crises before a mass audience. Therefore, although lacking a (not yet existent) strictly legal substance, the roots of later forensic persuasive speech can be traced. Consciously or not, and though Homeric poems lack arguments from probability, ad hominem argumentation forms the basis of persuasive speech in circumstances of an adversarial nature, reserving for 'evidence' from character a central role. It is in this light that the following literary evidence will be examined.

The first scene to be examined is the conflict between Agamemnon and Achilles in Book 1 of the *Iliad*. This dispute constitutes the triggering event of the poem, being the cause of all the resulting pains. The facts are widely known. The Achaean army is devastated by a god-sent plague due to the abduction of the daughter of Apollo's priest. Achilles calls an assembly (1.54, 1.57), which resembles legal proceedings,[16] in order for a solution to be found. Since the girl had been granted to Agamemnon, Calchas the prophet, after securing the protection of Achilles for his subsequent speech, predicts that, in order for the plague to end, Agamemnon has to give her back. Agamemnon, enraged, begins a quarrel with Calchas (1.104). He stresses the prophet's evil disposition, particularly against himself:

> Prophet of evil, never yet have you spoken to me a pleasant thing; ever is evil dear to your heart to prophesy, but a word of good you have never yet spoken, nor brought to pass (Hom. *Il*. 1.105−7).

However, portraying himself as protector of the people, Agamemnon agrees to Calchas' demand: 'Yet even so will I give her back, if that is better; I would rather

the people be safe than perish' (1.115-6). This constitutes a first indication of how character evidence could be used in a dispute to reveal a friendly disposition and gain the goodwill of a mass audience.

Nonetheless, the insistence of Agamemnon on replacing the girl by taking another [and in that way he unilaterally declares the case closed (1.138−40)], provokes Achilles' wrath so that the dispute escalates. Speaking on behalf of all the army, in an effort to gain the concord and support of the people and isolate the king (1.122-25), he insults him[17] by demonstrating his greed (*φιλοκτεανώτατε πάντων* - 1.122). Agamemnon, although acknowledging Achilles' purpose to 'induce' by persuasion both the king and the audience, replies:

> Do not thus, mighty though you are, godlike Achilles, seek to deceive me with your wit (*κλέπτε νόῳ*); for you will not get by me nor persuade me (Hom. *Il*.1.131−2)

stating that he has a valid claim due to his status as a king, which he is going to enforce (1.137−9).

The poet, sketching Achilles' emotional state, portrays him as 'glaring from beneath his brows' (1.148). His reply is again insulting (1.158: dog-face) but more importantly reveals the king's ingratitude and injustice (1.155−68). These arguments which made an impact on the army (cf. 2.239−40) provoke Agamemnon's reaction when he characterises Achilles as most hateful to him due to his propensity for violence ['for always strife is dear to you, and wars and battles' (1.177)].

Preventing further escalation (taking place through resort to violence / deeds as opposed to rhetoric / words), Athena intervenes and restrains Achilles. The latter, justifying his behaviour and putting the blame on his adversary, identifies Agamemnon's arrogance as the cause of the dispute (1.203, 1.205). However, ad hominem attacks continue (1.225: drunkard), with Achilles focusing on Agamemnon's injustice, cowardice and non-adherence to widely acceptable values:

> with the face of a dog but the heart of a deer, never have you had courage to arm for battle along with your people, or go forth to an ambush with the chiefs of the Achaeans. That seems to you even as death. Indeed it is far better throughout the wide camp of the Achaeans to deprive of his prize whoever speaks contrary to you. People-devouring king, since you rule over nobodies; else, son of Atreus, this would be your last piece of insolence (Hom. *Il.* 1.225−232).

The final piece is provided by the intervention of Nestor, aged King of Pylos (famous for his persuasive rhetoric), who tries to gain their goodwill[18] and their respect.[19] However, the unbalanced triangle of Nestor as arbitrator, Agamemnon (superior king) and Achilles (half mortal king) as litigants, and silently acquiescing subordinate warriors as audience did not produce reconciliation or any inducement to resolution.[20] The conflict is suspended with a last adversarial exchange.[21]

The preceding scene is not a mere quarrel or an exchange of insults. On the contrary, since the disputants are surrounded by an audience, both parties try to prove the validity of their claim. Both sides base their argumentation on widely accepted (though frequently conflicting or ambiguous) norms.[22] The conflict escalates, aggravated by the absence of a clear hierarchy of these norms and by the denial of retreat. Within a legal context, such a conflict of norms is rarer, since the law (unambiguous compared to unwritten norms) provides clear guidance as to how disputes are to be decided. For example, in fourth century Athenian courts, legal prosecutors could contain a series of adversarial incidents in a single legal offence, referred to in a written plaint. This reference to a breach of a particular written statute limited the spectrum of irrelevant argumentation and prevented any potential conflict of ambiguous norms.

Undoubtedly, similarities between Homer and Attic orators are evident. Achilles, inferior in status, tries to support his arguments with the concord of the audience.[23] The main aim of his invocation of character evidence is to arouse hostility (an emotional reaction) against Agamemnon, since his cowardice and greed have led him to commit injustice and to show ingratitude against the whole army. On the other hand Agamemnon, stresses his superior status and wants a quick end to the dispute, even by the threat of self-help. Both parties feel obliged to excuse themselves and put the blame on the other side, especially when addressing a respectable or superior third party (Nestor or Athena). Gradually it becomes evident that rhetoric is the adversaries' only weapon since violence (through the intervention of Athena) is declared unacceptable. Homer thus provides the first example of persuasive speech in a context of conflict before a mass audience.

The second scene, which comes from the *Iliad*'s Book 23, presents two speeches of Antilochus, Nestor's son, both delivered after a chariot-race held under the auspices of Achilles in honour of Patroclus. Diomedes won the race while Antilochus came second (exploiting his skills or even trickery), overtaking Menelaus who finished third. However, Achilles, pitying Eumelus who, though meritorious, finished last, proposed to give him the prize for the second place. This provoked the fury of Antilochus, who immediately protested. His purpose was to secure the prize, assisted solely by means of his rhetoric, and he proceeded in three steps. First, he stressed the injustice of this proposal, by presenting himself as the owner of the prize which Achilles wanted to strip from him (23.544: *μέλλεις γὰρ ἀφαιρήσ εσθαι ἄεθλον*). If Achilles wanted to honour Eumelus, he should give him another prize, not Antilochus'. Second, he puts the blame on Eumelus for finishing last, claiming that, although brave, in order to secure a good place he should have prayed to the Gods.[24] This argument seems to be a predecessor of similar ones found in Attic orators. In the fifth century's Antiphon's Tetralogies (Ant. 3.3.8) the prosecutor of a young man who has accidentally killed a boy while practising javelin-throwing argues that the young man may have been guilty of impiety. Thus, being 'stained', the young man was manoeuvred by the gods into a predicament which should result in his condemnation for accidental homicide. Also, Andokides

attempts to refute a similar accusation of 'condemnation due to impiety' by his opponents. He says:

> We are asked to believe that the only object of the gods in saving me from the dangers of the sea was, apparently, to let Cephisius put an end to me when I reached Athens. No, gentlemen. I for one cannot believe that if the gods considered me guilty of an offence against them, they would have been disposed to spare me when they had me in a situation of the utmost peril − for when is man in greater peril than on a winter sea-passage? Are we to suppose that the gods had my person at their mercy on just such a voyage, that they had my life and my goods in their power, and that in spite of it they kept me safe? (Andok. 1.137).

To return to the *Iliad*, Antilochus finishes his speech with a third point which is a threat of self-help.[25]

Antilochus' speech had attained its purpose, evidenced by Achilles' smile; he kept the mare while other gifts were announced for Eumelus. Although this part of the dispute ended at its very beginning, Menelaus stood forth and accused Antilochus of stripping him of the second place through trickery (23.570−85). Consequently, the prize belongs to him, unless Antilochus accepts an oath-challenge[26] swearing that his deceit had not been done willingly. Antilochus replies with a second speech. His implicit admission of treacherousness and the danger of having a dispute with Menelaus induce him to surrender the prize and make reconciliation the best available purpose for his speech. Thus, while his first speech had an adversarial tone, claiming that he had been treated unjustly, his second speech resembles the procedure of arbitration (Menelaus himself asks for the leaders of the Achaeans to act as judges to their case) and aims at reconciliation. Antilochus, acknowledging his guilt but placing the blame on his youth (a stereotype that continued down to the classical period), asks for Menelaus' patience and goodwill while offering the mare (23.587−92). Faithful to the purpose of reconciliation and recognising Menelaus' superior status (23.588), he even offers further goods from his possessions (23.593−4). Instead of a resort to the insulting name-calling of previous episodes, Antilochus mollifies Menelaus by calling him king (*ἄναξ*), a better and more powerful man (*πρότερος καὶ ἀρείων*), nourished by Zeus (*διοτρεφὲς*). Not only is reconciliation achieved, but Menelaus, soothed by Antilochus' speech, allows him to keep the prize, an outcome which in fact makes us wonder whether this was Antilochus' underlying purpose behind the apparent change of his rhetoric between his first and his second speech.

Homer, by offering in a short space two antithetical speeches by the same person, both achieving the same result (albeit through different tactics), enlightens us as to multiple potential uses of rhetoric, and offers a paradigm for suitable speech in different circumstances, of different 'means' of attaining an 'end'.[27] Antilochus' dynamic and aggressive rhetoric in the first speech gave place to the mollifying and reconciliatory one when encountering Menelaus. This

adjustment was successful and, in its accomplishment of Antilochus' aim of keeping the prize, we may also infer that it was purposeful. The persons, the audience, and the purpose, set the environment for rhetoric; it is true that in accordance with these same factors Aristotle in the late fourth century classified the types of rhetoric.[28]

The third piece of evidence comes from Book 3 of the *Iliad*. The scene is set on the walls of Troy. There, the old Trojans observe the Achaean leaders and ask Helen for information. When King Priam asks about a man and Helen identifies him as Odysseus, Antenor intervenes and offers his memory of their previous meeting. Odysseus and Menelaus were sent as envoys to Troy and Antenor offers his account of their rhetorical skills (3.212–24). He praises Menelaus for his precision and fluency; to this positive image he contrasts Odysseus' awkward original stance, followed by his eloquent speech:

> But when wily Odysseus leaped up, he stood there, his eyes fixed on the ground, and looked up from under his eyebrows. He did not move the sceptre back and forth, but held it immobile, like an ignorant man. You could say that he was surly and witless. But when his voice came, loud, from his chest, his words like snow, no other man could compete with Odysseus (3.216–24).[29]

Rhetoric had already established rules. Solemn performance and an eloquent speech 'to the point' (a rule that was later formalised in Athenian courts) were the criteria for judging an orator's quality. Nevertheless, the uncommon factor about Odysseus that surprised the audience was the interplay between personality (as wilfully presented by his original stance), performance and speech. Public oratory required skilful verbal composition in addition to a performative aspect through which the orator's character could be inferred and portrayed.[30] Odysseus, a pioneer indeed of argumentation from character, utilising a purposefully constructed antithesis between character (by means of his awkward stance) and speech (having surprising gravity), enraptured his audience, in a memorable – as to rhetorical skills – performance. Such a skilful presentation of a case, including the portrayal of character through the speech's composition or presentation, is attributed centuries later to Lysias by Dionysius of Halicarnassus. In both Lysias' and Odysseus' cases, the great impact of their rhetoric was due to

> the impression that this arrangement has not been deliberately and artistically devised, but is somehow spontaneous and fortuitous. Yet it is more carefully composed than any work of art. For this artlessness is itself the product of art.[31]

Homer was indeed a master of this art.

The final scene to be examined is Thersites' 'arhetorical' performance in Book 2 of the *Iliad*. The Greeks defined things by reference to their opposites, in forms of binaries (e.g. Greek / barbarian, man / woman, free / slave). This is the purpose of the invocation of this scene: to uncover the principles of skilful rhetoric

by examining the exact opposite. The poet provides the reader with very useful background information, in the form of a preliminary description of Thersites:

> He was the ugliest man of all those that came before Troy - bandy-legged, lame of one foot, with his two shoulders rounded and hunched over his chest. His head ran up to a point, but there was little hair on the top of it (2. 216−19).

Thersites' rhetoric lacked the qualities that were mentioned before: it was mistimed, imprecise, disorderly and disrespectful while his only care was to 'set the Achaeans in a laugh'.[32] His speaking voice is characterised as loud, presumably too loud, and shrill (2.223−224), two qualities skilled speakers of the classical period strove to avoid.[33] In spite of the fact that he does not possess Achilles' status, he uses the same arguments (albeit distorted) against Agamemnon. He even takes Achilles' side regarding their previous dispute, without considering his inferiority. However, according to the Homeric model of aristocratic domination, commoners who spoke out of place were soundly thrashed or worse.[34] Unsurprisingly then, when Odysseus decides to put an end to this measureless, artless speech, his act receives the unanimous approval of the army.

This last scene sheds light on two more issues, the first relating to the reaction of the people, and the second to the method that Odysseus used to silence Thersites. Although Thersites breaks the 'silent acquiescence' of the army and raises his voice, his act is far from justified. Mobilisation of public opinion failed and as a result his punishment was applauded by his comrades. Furthermore, his general disposition (apart from his failed rhetoric), certainly contributed to his receiving such contempt from the public. Homer describes one soldier saying to another:

> Odysseus has done many a good thing ere now in fight and council, but he never did the Argives a better turn than when he stopped this man's mouth from prating further. He will give the kings no more of his insolence.[35]

It is evident that apart from his speech, his previous record, character and status also condemned Thersites. As for the method used in performing this widely accepted act, Odysseus

> beat him with his sceptre about the back and shoulders till he dropped and fell a-weeping. The golden sceptre raised a bloody weal on his back, so he sat down frightened and in pain, looking foolish as he wiped the tears from his eyes (2.265−9).

But what does this sceptre represent in this and other contexts from archaic Greece? First, it is a symbol of public authority.[36] It arguably symbolises religious authority,[37] being a gift of Zeus, and possibly constitutes a 'dimming memory' of divine kingship.[38] What is of major importance is its potential symbolism of judicial authority, as presented in the trial scene of Achilles' shield (*Iliad* 18.497−508).[39] This symbol of rhetoric is used as the tool of punishment against Thersites, the

unskilled speaker who dared to insult the kings without even carrying the sceptre (thus without having permission to speak).[40] And by whom is he checked? By Odysseus, the skilled speaker, the one who rightfully holds the sceptre in his hands. The symbolism of that scene is powerful. Rhetoric in Homer already had rules of substance and procedure. Most of its basic features are present, only to be further developed in the following centuries. Procedural rules were set (albeit unwritten) as to who is allowed to speak and when. Substantive issues were developed as to how and what one ought to say in order to qualify as a skilled speaker. The personality, disposition and character of speakers were equally important factors, either revealed by the previous record of actions or by the speech itself; exactly as in classical Athens.

The scene on the shield of Achilles

The most famous juridical scene of the archaic period comes from Homer's description of a trial depicted on the shield of Achilles in book 18 (*Il*. 497−508) of the *Iliad*. The scene runs as follows:

> In the assembly place were people gathered. There a dispute had arisen: two men were disputing about the recompense for a dead man. The one was claiming to have paid it in full, making his statement to the people, but the other was refusing to receive anything; both wished to obtain trial at the hands of a judge. The people were cheering them both on, supporting both sides; and heralds quieted the people. The elders sat on polished stones in a sacred circle, and held in their hands sceptres from the loud-voiced heralds; with these they were then hurrying forward and giving their judgments in turn. And in the middle lay two talents of gold, to give to the one who delivered judgment most rightly among them.[41]

Although the legal interpretation of the dispute and the above translation are not free from controversy,[42] what is of interest here is the implication of the uncontroversial facts of the scene. The scope of the study will be extended and a discussion of general legal remnants of the archaic age will be added to the preceding one of rhetorical remnants. Both rhetorical and legal remnants were largely retained, reintroduced or transformed in the classical period. This reveals a tendency which has to be examined in the light of the conservatism and traditionalism of the Greeks.[43] This ideological context adds to the plausibility of this study's suggestion that the liberal use of character evidence was characteristic of the early stages of Greek law and, although substantiated and transformed, was nevertheless retained by Athenian litigants.[44]

The main issues arising from this scene (whether it is imagined or real) must be examined due to their contribution to our understanding of the archaic judicial process and they may offer some insight into the Greeks' approach to argumentation. As evidenced by the trial scene on the shield, the role of people in archaic trials was multidimensional. Starting with the described partisanship, it

may be inferred that adversaries had to direct their argumentation both to judges and to the crowd. Scholars studying the settlement of disputes in early Greek literature have often noted that a public forum like the agora or the assembly seems to have been an essential element in the early judicial process.[45] This was possibly yet another incentive for a broader invocation of character evidence in an effort to receive goodwill, persuade a mass audience and increase credibility. The adversarial nature of trials has been retained by the classical Athenian legal system. In particular, one of its most criticised features is its dependence on partisan witnesses.[46] It cannot be ruled out that these are remnants from the archaic period.

The second dimension of the role of bystanders in archaic trials is that under such conditions of a village moot, people tend to speak largely extemporaneously; litigants follow their natural tendencies and argumentation resembles everyday disputation. This environment of village moot or 'personal justice' achieved by familiarity was positively endorsed during the classical period. Aristotle, in a time when the polis (and the Athenian democracy) was reaching its end, still believed that straight judgment can be achieved by judges personally knowing the character of litigants.[47] The courts of classical Athens, whether or not functioning within a 'face-to face' society,[48] in an effort to understand the context of a dispute and its background (in an era when the gathering of hard evidence was impossible), permitted the wide use of oral evidence illustrating litigants' personalities and personal records. The roots of this approach can again be traced in the archaic period.

Public opinion was important for verdicts as well and that is a third dimension of the role of the people in archaic trials. The crowd, putting heavy pressure on the parties to accept a fair deal offered by the judges' best opinion, acted as the legitimising force of a verdict. This can be viewed as the seed of 'decision-making by majority vote' of later times. Spectators could hold judges to account (as they arguably did in classical Athens),[49] limiting arbitrariness or inconsistency of decisions. Possibly, this was a contributive factor that induced archaic *thesmothetae* to write down their previous decisions for future reference.[50]

Finally, the whole picture of archaic trials reveals the openness of the system. This aspect, favouring wide presence and even participation by amateurs, increased liberality in argumentation and, consequently, resort to character evidence. Classical Athens insisted on an ideology of amateurism even after the full development of the court system. Despite their degree of experience, magistrates responsible for introducing cases to courts were plain citizens selected by lot, as were the *dikastai* (jurors-judges). Legal direction by expert judges and formal deliberations before the verdicts were absent. Litigants, sometimes resorting to the aid of supporting speakers (and these, at least in principle, had a direct interest in the case), were expected to speak for themselves. Legal experts were approached with suspicion and overacting participants faced serious dangers.[51] Although the system evolved (from equity and reconciliation to a law enforcement and 'winner–loser' system) and was transformed,[52] significant trends remained.[53]

Rhetoric in the poems of Hesiod

Hesiod provides further evidence as to the evolution of the law in archaic Greece. What is particularly important to this study is the (explicit and implicit) evidence that both his major poems (*Theogony*, *Works and Days*) provide regarding argumentation during the settlement of disputes in the late eighth or early seventh century BCE.[54] The first passage that is of aid in tracing the origins of rhetoric, comes from Hesiod's *Theogony* (80−93). In this the poet refers to the benefits that the Muses confer on kings. If the Muses favour a king, Hesiod says:

> soothing words flow from his mouth. And all the people look at him, deciding the proprieties with straight settlements. And he, speaking surely, quickly and intelligently puts an end to even a great dispute. Therefore there are intelligent kings, in order that in the agora [the public meeting or market place] they may easily restore matters for people who have suffered damages, persuading them with gentle words.[55]

This proves that the gift of persuasion and the value of rhetoric must have been already acknowledged in the archaic Greek system of justice. It may be suggested that since rhetoric was valued to such a degree that even the kings were considered blessed if the Muses had conferred on them this benefit, it was also sought by common people, particularly by litigants. Moreover, such a system of – presumably – voluntary arbitration[56] which favours equitable decisions with a view to reconciliation provides a fertile ground for natural and liberal argumentation. As Hesiod maintains, rhetoric is valued for its soothing force in a village moot, capable of convincing both litigants and spectators of the 'straightness' of a judgment. Nevertheless, since public opinion played an important role in the proceedings, it may be suggested that apart from the judge, litigants had to convince the audience as well. Conformity with public opinion by gaining its goodwill and concord would increase the chances of reaching a favourable conclusion.[57] This approach is obvious in the works of the Attic orators.

The second piece of literary evidence comes from Hesiod's *Works and Days* (27−39). The central theme is the dispute[58] between the poet and his brother Perses as to the division of their inheritance. Whatever the details of the case, Hesiod is unwilling to submit (or resubmit) the dispute to the 'gift-devouring kings' and calls his brother to settle the matter themselves. The voluntary nature of arbitration and Hesiod's dislike of the judges (and / or their previous decision) have urged some scholars to propose that the recital of the *Works and Days* was an attempt to mobilise public opinion in order to achieve justice as he envisaged it.[59]

If this approach is correct, then Hesiod's *Works and Days* provides a testimony of a litigant's plea in an effort to convince a mass audience. Juridical rhetoric could have reached the heights of poetry, and Hesiod's verses provide us with a monument of positive character portrayal, namely a quiet, pious, caring individual valuing justice above anything else.[60] Hesiod follows the usual adversarial way of pleading his case. The main bipolar of this poem is *dike* and *hubris* (or *bie*).[61]

The relevance of character and merit to the legal proceedings and the effect of its exclusion can be seen in lines 189−94:

> Settlements will be by force and one man will destroy the city of another. And there will be no appreciation of a man who keeps his oath nor of a just (*dikaios*) man nor of a good man, but they will instead honour the doer of evils and violence. Justice (*dike*) will be by force and there will be no respect, and the worse man will injure the better man by speaking with crooked words, and he will swear a false oath.

Subsequently, in an effort to win goodwill, Hesiod uses arguments that are in concord with the values of his audience.[62] Also, by presenting justice as a matter of importance to each individual, he heightens the level of attention.[63] In a subtle way, he attacks his brother's character (214−6, 274−5) and presents himself as a preacher of justice for the benefit of the polis (225−37). All these aforementioned methods of argumentation, namely the positive portrayal of one's character, innuendoes aiming at character assassination, and an effort to gain the goodwill of the audience by presenting oneself as a peaceful, just citizen, who by his behaviour promotes the public interest, have become patterns of extra-legal argumentation in the Athenian courts of the fourth century.

Hesiod provides both direct and implicit evidence of original juridical rhetoric, remnants of which have travelled through time and space to fourth century Athens. The *Works and Days*' innocent victim who has been wronged, yet continues acting in wholehearted adherence to the quiet communal norms of the polis, touches the heart of Athenian forensic rhetoric. Hesiod's personal dispute becomes a matter for the whole community and through the norms and ideas expressed achieves universality; this approach to personal disputes is equally evident in the argumentation of Athenian litigants. Personal disputes have real impact on the life of the polis and they need to be settled accordingly. The best way to protect and perpetuate the prosperity of the polis is by reaching just decisions, by allowing the character and record of each litigant to be invoked in the courtroom and thus setting good or bad examples for the citizens of the polis. This approach was also followed by the Athenians.

Probability and character evidence in the Homeric Hymn to Hermes

The Homeric Hymn to Hermes is an invaluable piece of evidence about settlement of disputes in the late archaic period (presumably towards the end of the sixth century BCE).[64] The dispute arises when the newly born Hermes steals Apollo's cattle, hides them in a cave and slaughters two of them. Apollo, inquiring about his cattle, accuses Hermes of the theft, while the latter in a masterpiece of character portrayal, denies that he even knows what cattle are, due to his infant ignorance. That moment is crucial to understanding the use of character evidence in the archaic period. Hermes, in establishing character evidence as a method of pleading one's

case, sheds light on the inconsistency of the deed with his personality, pointing to the unnaturalness of the deed for a person of his calibre and his age. Such an act conforms neither to his 'role' nor to the stereotypical behaviour to be expected by an infant. It is actually the very first evocation of an argument from probability. His disposition is to care about childish matters:

> Am I like a cattle-lifter, a stalwart person? This is no task for me: rather I care for other things: I care for sleep, and milk of my mother's breast, and wrappings round my shoulders, and warm baths. Let no one hear the cause of this dispute; [270] for this would be a great marvel indeed among the deathless gods, that a child newly born should pass in through the forepart of the house with cattle of the field: herein you speak extravagantly. I was born yesterday, and my feet are soft and the ground beneath is rough; nevertheless, if you will have it so, I will swear a great oath by my father's head and vow that [275] neither am I guilty myself, neither have I seen any other who stole your cows – whatever cows may be; for I know them only by hearsay (265−78).

However, the conflict escalates. Apollo's insulting words (280ff.) and threats of use of force, make Hermes suggest submission of their dispute to Zeus. An assembly of gods is called (326), with Zeus setting 'the scales of judgment for them both' (324). The following scene reveals the adversarial nature of voluntary arbitration, where accusations and counteraccusations go hand in hand, in a manner reminiscent of the method of argumentation in classical Athenian courts. Apollo, the 'plaintiff', concentrates on the central issue of the dispute, accusing Hermes, the 'defendant', while the latter resorts to counteraccusations and a presentation of the wider context of the conflict, stating that Apollo burst into his house in an illegal search (368−86).[65] Apollo, launching insults against the infant Hermes (336−40, 345) presents his case providing circumstantial evidence: Hermes was the thief. Any efforts from the infant to prove himself innocent, though ingenious, were unsuccessful. Apollo concludes that Hermes

> lay down in his cradle in the gloom of a dim cave, as still as dark night, so that not even an eagle keenly gazing would have spied him. Much he rubbed his eyes with his hands as he prepared falsehood, and himself straightway said roundly: 'I have not seen them: I have not heard of them: no man has told me of them. I could not tell you of them, nor win the reward of telling' (358−65).

Hermes, on the other hand, begins with an attack against Apollo's character, pointing particularly to his violent behaviour and to his breach of the procedural norms:

> He brought no witnesses with him nor any of the blessed gods who had seen the theft, but with great violence ordered me to confess, threatening much to throw me into wide Tartarus (369−74).

Then, portraying himself as weak and beyond suspicion, in contrast with Apollo's strength, he offers a tricky, sophistic oath:

> For he has the rich bloom of glorious youth, while I was born but yesterday – as he too knows – nor am I like a cattle-lifter, a sturdy fellow. Believe my tale (for you claim to be my own father), that I did not drive his cows to my house – so may I prosper – nor crossed the threshold: this I say truly. I reverence Helios greatly and the other gods, and you I love and him I dread. You yourself know that I am not guilty: and I will swear a great oath upon it: – No! by these rich-decked porticoes of the gods. And someday I will punish him, strong as he is, for this pitiless inquisition; but now do you help the younger (375−86).

The poem, magnificently describing Hermes' acting who, in his effort to gain the goodwill of the gods and to support his credibility, even kept his swaddling-clothes in order to prove that his character and age were inconsistent with such a deed:

> So spake the Cyllenian, the Slayer of Argus, while he kept shooting sidelong glances and kept his swaddling-clothes upon his arm, and did not cast them away. But Zeus laughed out loud to see his evil-plotting child [390] well and cunningly denying guilt about the cattle (388−90).

The dispute ends with Zeus convincing them to give up their anger, both taking positive steps to achieve reconciliation, satisfying the aim of voluntary arbitration of disputes.[66] This poem offers an undoubted confirmation of the value of character evidence in archaic Greece.

The transcendent play: Aeschylus' *Eumenides*

The *Eumenides* (458 BCE) begins the action in a pre-judicial society, where the dispute arises not due to a breach of a (codified) law but due to an act of intentional homicide. This is unacceptable by the aggrieved parties and calls for retribution through self-help. The play is interpreted as the aetiological myth behind the establishment of the court of Areopagus and the court-system in general. Although referring to the distant past, Aeschylus mixes contemporary elements of judicial procedure and offers a transcendent picture of Athenian courts. Analysis of this play offers an insight to the underlying legal and rhetorical ideas of the day. Although sometimes deviating from the strict treatment of argumentation, the following discussion illuminates Athenian approaches to justice three decades before the period of the orators. It provides the ideological context, it sketches the canvas on which they have put their marks and reveals the structural and ideological tensions instigated by the recent reforms of Ephialtes in the function of the Areopagus.

The Furies, acting on behalf of Clytemnestra (the victim) chase Orestes (the perpetrator) to exact his punishment (135−40, 176, 185ff. 300). The Furies represent the Old Order, where acts of vengeance and retribution, justified by

a primal sense of justice, lead to an interminable circle of violence between opponents. Orestes, desperate for protection, introduces the dispute in the public sphere by seeking the aid of Apollo. The purification offered by the latter (281−7, 445, 578), being a stage of the early process of overcoming the pollution inflicted on the perpetrator of homicide (which left its remnants to the classical age as well), is not sufficient. On the other hand, the Furies want the dispute to remain private. Only an intervention by a powerful, respected and authoritative third party could end this circle of violence, by channelling the feud into an acceptable institution (here arbitration by Athena). Again, however, this is not perfectly legitimate, even though both parties agree to submit their dispute to her. Athena, declares herself incompetent (470−2) and announces the foundation of a new institution, the court of the Areopagus. This new institution, which was foreseen by Apollo, provides alternative means of exacting justice, in the form of words rather than deeds, persuasive rhetoric rather than raw force (81−2).[67] The fact that jurors are chosen from among the finest citizens of Athens reserves consideration for public opinion, thus legitimising its operation.

The facts of the case are not in dispute (463, 588, 611). Orestes has killed his mother, Clytemnestra, following the oracle of Apollo, in order to avenge the murder of his father. However, the parties disagree as to whether the murder was justified (lawful homicide 468, 472) or not, both believing in the validity and justice of their claims (155, 210−20, 272, 312, 510). This conflict as to priority of values conceals a conflict between two worldviews. Gradually, the establishment of the court and the transformation of a never-ending dispute into a purely legal issue, transforms a pre-judicial society of disorder and self-help (personified by the Furies), into the new order of the Olympians, namely an ordered polis, founded on legality, justice and reconciliation.[68]

The legal issues of the case are equally fascinating. The play transcends space-time and merges three different systems of justice: one based on self-help and retribution, another on voluntary arbitration, and then finally the formal adjudication within a court system. The first system represents a pre-judicial era, where justice was equated with retribution, punishment of the perpetrator and satisfaction of the aggrieved. The second system represents a proto-judicial form of justice which, although retained down to the classical period, was based on equity[69] rather than enforcement of law. Finally, the court of the Areopagus represents the rule of law; a legal order where disputes are transformed into legal cases, argumentation takes the form of forensic rhetoric, and an impartial, competent jury gives its verdict in accordance with law (680, 710). This new institution, supported by the powerful members of society (here Athena), inspired respect and fear – deterrence (690, 827). Its primary aim was the harmony of the polis and the protection of the public interest. In addition, the promotion of social order provides benefits for the parties themselves; apparently, when the Furies (the losing party of a tie vote) face the dilemma of dwelling honoured in a prospering Athens or leaving (851−70, 887), they decide on the former (900).

Nevertheless, this picture of the court is not fully consistent with the Athenian system in practice. Arbitration can be a win-win system, but court decisions tend

to create winners and losers.[70] Under the latter, reconciliation is not possible and losing parties may be aggrieved and subsequently hostile to the polis. On the other hand, lenient treatment or avoidance of harsh punishment to keep both parties satisfied may become disadvantageous. When the Furies describe how disorder and injustice will prevail if the unjust fears no more, they anticipate possible tensions and balance of interests that this court system has to encounter.

Aeschylus proposes a mixture of the three systems of justice, retaining the positive features of each. The first system contributes deterrence. The fear of punishment (in the form of violent retribution) of the first system, is transformed and legitimised under the shield of the polis, with the law, impartial and cold, limiting potential arbitrariness and prescribing in advance the sanctions for each offence. The second system, that of voluntary arbitration, aims at reconciliation. Aeschylus retains this factor as beneficial to the new order. Thus, for the new system to promote the harmony of the polis, it has to aim at the reconciliation of the parties, while maintaining the goodwill of the losing party towards the city. Instead of simply using the strong arm of the law as punishment and deterrence, which could provoke humiliation and create incentives for revenge, one should aim at the transformation of the losing party into an educated, good member of the polis. Finally, the arbitrariness of primitive systems is substituted with the rule of law as expressed by the verdicts of an impartial court. Legitimacy is guaranteed by the participation of citizens, the jurors' submission to oaths and the public's harmonious adherence to decisions.

Aeschylus' vision, as interpreted here, notwithstanding the expressed reservations, is not entirely alien to Athenian courts. Although arbitration (promoting equitable solutions) and a court system (reaching legal verdicts) coexisted in classical Athens in a parallel fashion, this process of evolutionary experimentation transformed the archaic ideas of justice and created new approaches. The extremely important innovations of written law-codes, the legitimacy of mass jury courts (as opposed to potentially arbitrary magistrates), and the legal verdicts that were verified by oaths allowed for a different perspective of justice. In a context of tension and order, of experimentation and steadiness, of reconciliation and punishment, a new legal system had emerged. A legal system which was elaborate, pluralistic and capable of achieving the rule of law. The new courts of law, as final adjudicators and guardians of legality, retained tolerance to liberal argumentation, allowing thus for flexibility, albeit without inhibiting the rule of law.

Rhetoric in the Eumenides

In the *Eumenides* in particular, as far as rhetoric is concerned, many similarities can be observed with the Attic orators. A wide invocation of extra-legal argumentation is adduced, notwithstanding the fact that Athena reminds the jurors to respect their oath (490, 710). Certainly, this does not mean that, as Aeschylus favoured a semi-legal / semi-equitable approach to justice, the same is true for Athenian courts of the late fifth and early fourth centuries. Nevertheless, this liberal argumentation found in the *Eumenides*, adds one more argument that this approach

was a remnant of the archaic age, inconsistent neither with legality and justice nor with the requirement of 'speaking to the point'. Character evidence, though more relevant to the context of arbitration, was apparently (and purposefully) not restrained under the new system of courts.

In the play, Orestes and Apollo use arguments based on the 'public interest'. They try to gain the goodwill of the jurors and envisage the impact of a positive verdict (289, 670). Similarly, in the Attic orators, it is usual for a litigant, apart from mentioning any harsh impact of a potential adverse verdict, to stress the justice of his case in connection with the positive public impact that a favourable to himself outcome would produce.[71] Due to the adversarial nature of Athenian trials, opponents were forced to refute such an argument in order to prevent a favourable to the adversary verdict.[72] This indicates that such a 'public impact' consideration was received as relevant and valid, and still retained its force.

However, what is not explicitly evidenced in the Attic orators (and this is certainly explicable) is the kind of argumentation resembling that of the Furies. They, in their part, also argue about the impact that an adverse verdict would have, not on them (as in the Attic orators) but on the polis (502, 720). This referred to their direct threat of destruction and famine that would fall on the city. In the context of Athenian trials, such arguments would be suicidal.[73] One way or another, invocation of such argumentation based on public interest remained central and relevant to the legal case. Aeschylus, through the final appeasement of the Furies, reveals the proper rationale of a legal system and the proper pathway to make it effective.

Another similarity with the Attic orators, refers to the issue of 'political correctness' shown by hereditary loyalty to the court, the constitution, or the jurors (or the opposite, hereditary enmity).[74] This argument is adduced (455−6) to reveal the friendly relations of Orestes' father, Agamemnon (whose death he avenged), with Athena. It aimed at the establishment of (direct or indirect) contact with the jurors in order to gain their goodwill. A similar tactic is used by Apollo, when he argues that his oracle interpreted the will of Zeus (617−21). Athenian litigants frequently refer to their services to the polis and their friendly relations with highly respected members of society. They also highlight their detestation of and enmity towards persons hated by the jurors as well.[75] This establishment of concord in order to provoke a friendly disposition of the audience is also suggested by Aristotle (e.g. *Rhetoric* 1381a, *Nic. Eth*. 1167a−b).

Athena, in a procedure resembling '*anakrisis*',[76] had already asked for the background of the parties, as well as the background to the dispute. Apollo, a supporting speaker (579), argues for the justice of Orestes' act (as well as his own support) by arguing that his oracle was Zeus' command, which in this case represents the ultimate law (621). Apollo is the infallible interpreter of Zeus' will, and since Orestes' act conformed to his interpretation, it is unavoidable that the three of them are in concord. Again, this resembles the practices in the Athenian courts, in the sense that litigants offered themselves interpretations of relevant laws and tried to prove that their acts were also in concord with the interpretation of the majority vote of the jury. In the absence of *ratio decidendi*, winning litigants' speeches replaced

the archaic judges' opinions from which the 'straightest judgment' was chosen (as represented in the scene of Achilles' shield), and hinted at the verdicts' rationale.[77] The adversarial nature of argumentation is much more evident than in Attic orators but nevertheless retains similar characteristics. In this context, refutations of the adversary's arguments, a wider background of the dispute (625) in order to prove one's right, an effort to gain the goodwill of the judge (666), arguments from precedent (not strictly legal but persuasive: 718) and references to gratitude (725) are offered.

A closer look at the above issues can be revealing. Athena establishes the fairness of the procedure by asking both parties to submit their cases (428). The Furies, while interrogating the matricide Orestes, rejoice at their successful attempts in showing his guilt (589), simultaneously trying to influence the jurors. On the other hand, Orestes, willingly submits his fate to Athena. His former supplication (474), although not taking place in the course of the trial, is also a reminder of scenes from Athenian trials where defendants chose this ritual (coupled with their innocence) as a final attempt to ask for pity.[78] Apollo, the supporting speaker, uses euphemistic words for the court directly addressing the jury (614) and for Athena (664), while degrading the Furies with insulting name-calling (644). Furthermore, the praise for the dead, manly, warrior Agamemnon (625, 637), especially in light of his sneaky murder by his wife, a woman (627), is used to arouse the emotions of the jurors (638) and closely resembles the tactics of argumentation in Athenian homicide trials. Finally, Apollo's personal occupation as the infallible soothsayer of Zeus' will (616) proves the justice of Orestes' act, and is another reminder of the positive or (mainly) negative effect of referring to occupation or calling in the Attic orators in order to prove or disprove the credibility and disposition of a litigant.

The use of precedent is equally interesting. Although modern scholars attribute different characteristics and aims to this form of argumentation in Athenian courts,[79] it is useful to remember that Aristotle in his *Rhetoric* (not a legal treatise but a manual for speakers), treated precedent as a form of example whose aim was not solely to prove the legality of a case but to persuade the audience about the truth or plausibility of an argument by reference to the past (e.g. *Rhet*. 1356b, 1357b, 1377a etc.). In the *Eumenides*, at first sight, a similar approach is taken, but a closer look reveals that different forms of precedent (factual, legal, persuasive) are already present.

The simplest form of precedent that is used in the text, the factual, does not require any legal insight but merely rational reasoning in recognising similarities and differences. Apollo, in support of his argument that a father is the real parent of a child and therefore Orestes' act of matricide is justified in avenging the death of his father, cites the following example which, although it may not be repeatable, still has persuasive force:

> The mother of what is called her child is not the parent, but the nurse of the newly-sown embryo. The one who mounts is the parent, whereas she, as a stranger for a stranger, preserves the young plant, if the god does not harm

> it. And I will show you proof of what I say: a father might exist without a mother. A witness is here at hand, the child of Olympian Zeus, who was not nursed in the darkness of a womb, and she is such a child as no goddess could give birth to (658−65).

Notwithstanding the fact that this example is highly sophistic, it nonetheless shows how an argument from precedent could be used in support of one's case. The second example is deeper and more revealing. When Apollo argues that Zeus gives a greater honour to a father's death, the Furies remind him that Zeus himself bound his aged father (640−3). Nevertheless, Apollo, in a logically and legally persuasive argument, distinguishes the two cases by arguing that

> Zeus could undo fetters, there is a remedy for that, [645] and many means of release. But when the dust has drawn up the blood of a man, once he is dead, there is no return to life (644−7).

An act of homicide needs to be distinguished from a rectifiable act of violence. Finally, the third example of argumentation from precedent suffices to clinch the issue. Both litigants address the jurors while they vote, arguing for the justice of their case (711−14). The Furies threaten them with their rage while Apollo directs them to respect his oracles, which come from Zeus. To this the Furies protest and refer to them as not applicable, because Orestes falls outside the scope of Apollo's oracle since he was impure. Apollo's reply is convincing:

> Then was my father mistaken in any way in his purposes when Ixion, who first shed blood, was a suppliant? (717−18).

Apollo refers to a previous, unmistakable 'verdict' taken by Zeus. How similar were the two cases? The most complete account of Ixion's tale comes from Pindar in his Pythian Odes. Ixion is a fundamental character in Greek mythology, significant in many respects, but is chiefly known as the first human to shed kindred blood. This occurred when Ixion invited his father-in-law, Deioneus, to come and collect the price that Ixion owed him for his bride. Upon his arrival, Deioneus fell into a pit filled with burning coals Ixion had camouflaged. Because this was a crime new to the human race, nobody could purify Ixion and he wandered in exile. Zeus took pity on him and decided not only to purify Ixion, but to invite him to Olympus as a guest. The similarity of the case Apollo chooses is striking. The first example of legal precedent is set, an important constituent of Aeschylus' aetiological myth of the creation of the court.

To conclude, in these early days of the new, vulnerable court system (following the reforms of Ephialtes), the influences of the status quo are evident. The *Eumenides* provides an example of the method of argumentation during the settlement of disputes, proving the claim that the wide use of character evidence was indeed present before the age of the Attic orators. This way of argumentation had survived from previous years and probably from previous systems of justice.

Evidence from comparison: the story of Deiokes

The Median Deiokes was a man of great ability and popularity, as described by Herodotus in his *Histories* (1.96ff.). Although written in the second quarter of the fifth century, and this alone explains many of this period's biases, the story refers to the late eighth century BCE. Deiokes, a man of mark in his own village (since the Medes had established themselves in small settlements) was chosen to arbitrate his fellow villagers' disputes. His reputation for integrity and fair judgment made him a preferred judge for all the Medes. One day, realising his great power, he announced that he was tired of this process and wanted to retreat to privacy. The result was an increase of disorder and contempt for law; therefore the Medes called for a general meeting in order to deliberate on the issue. Their decision was to centralise the government by setting up a monarchy, with Deiokes being their chosen ruler. Deiokes' first act was to command his subjects to build him a palace and to grant him the protection of a private guard. In addition, a certain ceremonial was established to prove his superiority. Finally, the administration of justice was transformed:

> Once his sovereign power was firmly established, he continued his strict administration of justice. All suits were conveyed to him in the form of written documents, which he would send back after recording upon them his decisions.[80]

The above story provides valuable evidence, especially if examined through a Greek lens and evaluated in contrast to Greek practices. This passage does not explicitly provide evidence for the kind of argumentation used before a tribal judge, yet is illuminating if contrasted to the Greek public and open approach to justice. It may therefore be used as circumstantial evidence (by comparison) in order to supplement our previous findings. First, an inference may be drawn that Deiokes, in his early steps, acquired his prominent status due to his 'straight' judgments, supported by public opinion as well as the voluntary acquiescence of litigants to his verdicts. This suggests that decisions were taken publicly, in a kind of a village moot, resembling the archaic Greek practice as described by Homer, Hesiod, and the Homeric Hymn to Hermes.[81]

This picture, which closely resembles the Greek experience of the archaic period, is contrasted with Deiokes' behaviour after his acquisition of power. Village moot is substituted by autocratic decision making. Arbitration and reconciliation is replaced by espionage and punishment. Finally, a presumably relaxed, oral, liberal argumentation gives place to stricter, shorter, written pleas.[82] Herodotus, by providing this example from Persian experience, offers a sharp contrast with the traditional openness of the Greek legal system, which favoured amateurism and participation rather than professionalism and exclusion, and promoted a democratic legitimisation of judiciary rather than Deiokes' autocratic (and potentially arbitrary) methods. In Athens for instance, public opinion retained its traditional role as the legitimising force behind decisions.[83] The presence of elite bystanders

and numerous spectators in the *corona* may have affected the litigants' rhetoric in a number of ways.[84] The connection between the classical Athenian approach to justice (and, by inference, to argumentation) and its archaic counterpart is obvious. The story of Deiokes proves that the Athenians were aware of alternative approaches to justice; nonetheless they deliberately and purposely retained an open and public legal system. A significant component of this system was the liberality in argumentation enjoyed by litigants, in the belief that this served the courts' purpose of attaining the truth.

Archaic legal remnants in the classical legal system

Homicide laws

Apart from the archaic legal remnants drawn from the trial scene depicted on the shield, even more can be adduced. Hard evidence, like the inscriptions of Draco's homicide laws of the seventh century, support the view that the archaic developments were still influential during the late classical period. These laws were attributed a divine origin[85] and reveal the traditionalism of Athenians. Due to their ancestry they were valued above all other laws at least until the late fourth century.[86] Draco's laws remained unspoilt during Solon's important innovations of the early sixth century, survived Cleisthenes' reforms of 508/7 BC, and were the first to be re-inscribed (unaltered) during the wide revision of laws in the last decade of the fifth century.[87] The great respect of the Athenians for their tradition salvaged Draco's laws unchanged for more than three centuries. The extension of the scope of homicide laws (e.g. by introducing the procedure of *apagoge*, introduced in the second half of the fifth century),[88] simply corroborates the idea that ancestral legal norms, overwhelmingly procedural, gradually gained substance and developed simultaneously with the whole system. Their supplementation by the introduction of supportive written laws and their non-legalistic definition through oral norms did not strip them of their initial rationale.[89] Changes were made with a view to extending the scope of the original law, rather than altering or repealing it.[90] *Mutatis mutandis*, other legal and extra-legal remnants of the archaic period, such as the wide use of character evidence, received a similar treatment.

Archives

Another traditional aspect that was supplemented and enhanced during the next centuries was the inscription of archives and records. The archaic period was an enormously significant era in every aspect of human life. In particular, wider utilisation of writing gradually made law the property of all citizens indiscriminately (especially due to the openness and public nature of the Greek polis). Even if the original purposes of written laws were the avoidance of arbitrariness (to be effected by the presence of checks from other members of the ruling elite) and the inscription of the more controversial rules so as to give them precision,[91] nevertheless,

with the aid of time, written rules acquired the status of the only legitimate law, perceived as the ultimate democratic and just ruler.[92] In addition, legal codification was a major step towards the rule of law. Writing laws and recording previous decisions (as the *thesmothetae* did) triggered a habit of public law-making and enforcement, which in turn undoubtedly proved a prolific seed of later democracy. Citizens were now able to see the actual law carved on wood or stone.[93] In Athens in particular, they even developed a public archive, the *Metroon*.[94] By the introduction of written laws (*nomoi*) for the substitution of *thesmoi*,[95] the early judges' possible arbitrariness was curtailed. In classical Athens, officials were forbidden to use unwritten laws (Andoc. 1.85−7), litigants faced the threat of severe punishment for citing a non-existent law (Dem. 26.24) and, by the early fourth century, witnesses presented their testimonies in written form. Originating in the innovations of archaic Greece, a modern legal system had emerged.

Conclusion

Many examples could be adduced of ancestral legal remnants in classical Athenian law, relating both to procedure or to the powers of the officials.[96] Although Athens experienced important changes and innovations in the fields of law and politics, the fact that these were probably less violent than in other city-states provided for a smoother evolution of its legal system. Oral rules and norms were codified in the form of written laws, disputable *themistes* of the past gave place to *nomoi* legitimised by the community, and self-help was substituted by an elaborate system, offering two pathways: the law-courts or public and private arbitration.

The system developed through progressive consolidation of previous norms. Such norms, after being recorded and publicised, were gradually substantiated, clarified, and supplemented. Although primal oral rules were mainly procedural (and this is attested in the epigraphic evidence), in classical Athens substance was equally, if not more, important.[97] In the absence of hard evidence, any effort to reconstruct a precise history of character evidence in Athens may resort to speculation. However, based on the above discussion, it can be argued that the evident (to modern standards) wide use of such argumentation has firm roots in the past. Its persistence and its preservation have to warn us against any easy conclusions based merely on the evidence provided by the Attic orators. Deeper roots have to be traced and universal explanations of this phenomenon need to be sought. The wide use of character evidence undoubtedly served the utilitarian purpose of escalating the impact of forensic rhetoric on jurors but the cause of it has to be sought in the Greek ideas of character and personality. These remained unaltered since the archaic age and they provide the underlying rationale for the relevance of extra-legal argumentation in general and character evidence in particular.

The existence of rhetoric, not as a scientifically formulated art but as a set of common-sense rules formulated by a natural inclination towards persuasive speech, is apparent from Homer onwards. Literary evidence supports such a view. Hesiod portrays persuasive speech as a gift of the Muses. Hermes offers the first

attested argument from probability, in an example of adversarial argumentation closely resembling arguments from classical Athens. The persistence of the methods of argumentation attested in the archaic literature, interpreted in the light of the gradual codification of other archaic procedural legal norms, testifies for the possible presence of an uncodified rule of relevance in early Greek law, with the sole requirement to 'speak to the point', which was gradually substantiated and clarified before the age of the orators.

This argument becomes less speculative due to the fact that this rule is attested in relation to 1) the court of Areopagus and 2) private suits (*dikai*). The court of the Areopagus was respected as the most ancient and traditional court institution of Athens. Its origins cannot be traced with precision, with myth and history further clouding the picture. Aristotle informs us that litigants before the Areopagus were forbidden to speak outside the issue (Arist. *Rhet.* 1354a22−3). In conjunction with this, in *dikai*, the court procedure most resembling archaic trials (e.g. as depicted in the shield of Achilles), it was required that 'opposing litigants swear to direct their speeches to the actual issue' (Arist. *Ath. Pol.* 67.1).[98]

Therefore, it can be suggested that is not a mere coincidence that this rule of relevance is provided for these two institutions. It is reasonable that in archaic trials, litigants, far from exchanging insults, gossiping and deviating from the main points of the case – which would certainly disgruntle the audience (in the agora) and the judges (who had to manage time efficiently in order to adjudicate on other cases as well)[99] – were encouraged to offer their viewpoint, not in a limitless manner but by speaking to the point. Though originally loosely formulated, this rule was progressively defined by a self-regulation of the actors made up by the views of litigants, spectators, and judges as to what is relevant.[100] Such an inductive method of extracting and formulating rules is far from atypical for the ancient Greeks. Also, this approach coincides with the more general picture of Greek law. The Greeks, believing in the capability of anyone to grasp the meaning of legal justice, interpreted their laws by reference to common sense. By the same token, verdicts were validated by the assent of the majority, rather than by legal expertise.

The result of this approach was the Greeks' indifference as to codification of their findings in a scholarly manner. Yet they succeeded in making law a common property.[101] After all, the laws were neither remote nor strange to them; they were made by the community and for the community. The law was not arbitrarily imposed on the community. Plain citizens were the first and the last to understand them and adjust their behaviour accordingly. Hence, they deserved the acknowledgement of their ability to define them and the privilege of interpreting and enforcing them.

Athens, in particular, illustrates this common-sense interpretation of laws by virtue of the majority decision making of mass juries. Although it may be argued that such an approach may lead to inconsistency of verdicts, factors such as the traditionalism of Athenian society, the limitations posed by the presence of written laws and the written plaint, and the obligation of jurors to judge in accordance with their oath (thus with the laws), probably enabled the Athenian courts to largely overcome this problem. Additionally, litigants were required to speak

to the point and evidently (in the Athenians' opinion) were largely successful.[102] It therefore needs to be asked why they were successful by their own (not our) standards. After all, in controversial issues such as the definition of the rule of law or legal relevance, no easy solutions can be offered. What was considered relevant in nineteenth-century Britain may be irrelevant today, or what is relevant in the contemporary United States may be irrelevant in Saudi Arabia.

The consistent rhetorical patterns that Athenian litigants followed for more than a century can be interpreted as the substantiation of a (previously uncodified) notion as to what is relevant. Presumably, these patterns reveal that after centuries of experimentation, argumentation found in the Attic orators was considered to be to the point. Additionally, jurors probably expected the invocation of these patterns of argumentation and the wide invocation of character evidence included. This 'legitimate expectation' afforded to such arguments a second justification, equally legitimate to the purely legal one, as efficient means of persuasion. These two points combined suggest that all participants in Athenian trials remained loyal to templates as to what is relevant and how a case should be argued and decided. In this way, Athenian courts were actually capable of achieving a relative, at least, degree of consistency. Deciding strictly legal issues by utilising character evidence and extra-legal argumentation as a means to uncover the facts of a case before the application of the law extended the rules of relevance but conformed to judging cases in a manner far from ad hoc or inconsistent. The following chapters will further illuminate the issue.

Notes

1 This expression presupposes a (strict or loose) unity of Greek law (or at least a structural consistency of Greek legal behaviour) through time and space, which, although it has been contested by scholars, is now accepted, including by myself. Cf. Gagarin (2005), Foxhall and Lewis (1996), pp. 1−2.
2 Cf. Christ (1998b), p. 26; this issue will be discussed later in the chapter.
3 Cf. Gagarin (2003).
4 Cf. Gagarin (1986), pp. 46 and 133−4.
5 This reform is regarded as typical within the process of evolution of a legal system from a primitive to a more elaborate state. This is evident in the archaic law codes [e.g. inscriptions from Dreros, Chios and Eretria (all dated 650−620 BC), the homicide Law of Draco, Gortyn's law code etc.]; Gagarin (1986) observes that one of the most notable things about all Greek laws from the very beginning is the way in which they focus on procedure and do not concentrate either on defining criminal activity or on establishing fixed penalties for fixed crimes; Todd and Millett (1990) state that 'In Athens, so far as we can tell, procedural law held both a chronological and a logical priority . . . Procedure came first and a substantive right could only exist where there was a procedure available to create that right.' However, the laws gradually took a substantive orientation, especially obvious in the Athenian setting during the age of the Attic orators [Harris (2009)].
6 By 'rhetoric' I refer either to the subsequently developed art or to the natural instinct of argumentation and mode of speech inherent in any human being facing the challenge of persuading others. I hope that the difference in use will be obvious by the context.
7 Kennedy (1980) pp. 9–15 and (1963) pp. 35–40, stresses a number of similarities between Homeric rhetoric and its classical form. Also see Edwards (1991) pp. 55–60; Karp (1977); Cole (1991) pp. 33–46.

8 Cole (1991), p. 39.
9 See Schmitz (2000), pp. 66−7.
10 Cf. Schmitz (2000), p. 64: 'The strategy of mentioning specific dates and places and giving specific names is one of the most persistent ways of achieving verisimilitude, employed in countless fictional narratives from antiquity to the present day.'
11 For emotional appeals in Homer see Carey (1994), p. 27; Kennedy (1980), p. 12.
12 Cf. Kennedy (1980), p. 11.
13 Cf. Kennedy (1980), p. 13, where Kennedy takes a less conservative approach by stating: 'The character (ethos) of Agamemnon, which he regards as evil, is to him a more important factor than the emotional appeals which have been made.' This reference to previous acts as revealing an individual's character and general disposition is indeed one of the most important weapons of the Attic orators and of litigants diachronically.
14 On the use of historical example cf. Kennedy (1963), pp. 37−8.
15 Kennedy (1980), p. 14. Cf. Kennedy (1963), p. 36: 'the speaker relies heavily on his personal authority and the impression he gives, as does Agamemnon in his debate with Achilles in book one. Thus also Athena increases the poise and dignity of Telemachus in *Odyssey* 2.12, to make up for his youthfulness. Later rhetoricians did not forget the importance of weight of character in effecting persuasion.' Kennedy concludes that 'Much can be learned about classical rhetoric from the ninth book of the Iliad. Many devices of invention, arrangement and style were clearly in use long before they were conceptualised and named . . . The role of ethos, or character, is particularly strong . . .'
16 Havelock (1978), pp. 129ff.; Bonner and Smith (1930–38 reprinted 1968), pp. 2−11; White (1985), p. 33.
17 Harding (1994), pp. 197ff., following other scholars, traces the origins of the comic abuse or invective [*loidoria*] to Homeric name-calling.
18 Hom. *Il*. 1.258: 'you two quarrelling, you who are chief among the Danaans in counsel and chief in war'.
19 Hom. *Il*. 1.258ff: 'Listen to me, for you are both younger than I. In earlier times I moved among men more warlike than you, [260] and never did they despise me . . . [270] And I fought on my own; with those men could no one fight of the mortals now upon the earth. Yes, and they listened to my counsel, and obeyed my words. So also should you obey, since to obey is better.'
20 Lloyd-Jones (1971), p. 13: 'Had Nestor and not one of the disputants been the king, they would have been obliged to follow his instructions. But the quarrel is one in which the king, whose duty it is to give justice to his subjects, is himself a party, so that the human machinery for securing justice cannot be set into motion.'
21 Hom. *Il*. 1.284ff: 'In answer to him spoke lord Agamemnon: [285] "All these things, old man, to be sure, you have spoken as is right. But this man wishes to be above all others; over all he wishes to rule and over all to be king, and to all to give orders; in this, I think, there is someone who will not obey. If the gods who exist for ever made him a spearman, [290] do they therefore license him to keep uttering insults?". Brilliant Achilles broke in upon him and replied: "Surely I would be called cowardly and of no account, if I am to yield to you in every matter that you say. On others lay these commands, but do not give orders to me".'
22 Cf. Gagarin (1986), p. 105.
23 Humphreys (1983), p. 230 observes that in acephalous or 'stateless' societies disputants try to mobilise public opinion in support of acts of self-help. The community cannot remain uninvolved in the dispute, though it may be reduced to silent acquiescence in a questionable victory of the stronger party. She sets this scene as an example, together with Telemachus' unsuccessful attempt to arouse public opinion against his mother's suitors in the Ithacan assembly in *Odyssey* 2.
24 Hom. *Il*. 23.546–7: ἀλλ᾽ ὄφελεν ἀθανάτοισιν εὔχεσθαι: τό κεν οὔ τι πανύστατος ἦλθε διώκων.

25 Hom. *Il*. 23.553–4: τὴν δ᾽ ἐγὼ οὐ δώσω: περὶ δ᾽ αὐτῆς πειρηθήτω ἀνδρῶν ὅς κ᾽ ἐθέλῃσιν ἐμοὶ χείρεσσι μάχεσθαι.
26 This is yet another remnant of the Homeric period which survived down to the classical Athenian legal system.
27 This 'means'−'end' type of practical reasoning is the typical model of the Greeks for interpreting human action. See Chapter 5.
28 For deliberative speeches in Homer see Toohey (1994) where he examines five deliberative speeches of Nestor; Kennedy (1980), p. 11, finds similarities of Homeric rhetoric with yet another genre, namely epideictic oratory.
29 Cf. Bers (2009), p. 27: 'Antenor commends Menelaus' speech for excelling in what we might suppose were the usual criteria, clarity and persuasiveness . . . there was, then, a way one was expected to speak, or at least to wield the sceptre, the physical object that, as it were, gave one the floor. Odysseus succeeds in part by playing off against an established mode to trick his audience into taking him for a dolt, or at least an amateur in the grip of embarrassment and fear.'
30 Fredal (2001), p. 253.
31 Dion. Hal. (Lysias 8.25−34).
32 Hom. *Il*. 2.212–15: 'The rest now took their seats and kept to their own several places, but Thersites still went on wagging his unbridled tongue – a man of many words, and those unseemly; a monger of sedition, a railer against all who were in authority [*kosmos*], who cared not what he said, so that he might set the Achaeans in a laugh.'
33 Bers (2009), p. 27.
34 Fredal (2001) citing Martin (1989): In such a world 'speaking length and audience tolerance were directly proportional to social rank: from Zeus to the lesser gods, from Achilles and Agamemnon to the lesser chieftains and soldiers. Aristocrats could by definition talk longest and best'. Cf. Dover (1974), p. 30.
35 Hom. *Il.* 2.272−7.
36 See Gagarin (1986), p. 27.
37 Gernet (1965); Cf. Hom. *Iliad* 2.101–8; Gagarin plausibly states that such a religious symbolism of the sceptre is not present in Homer [Gagarin (1986) at p. 27, n. 28].
38 Mondi (1980), p. 211; pace Calhoun (1962), p. 436.
39 'The town elders sat in a ring, on chairs of polished stone, the staves [skeptra] of clarion criers in their hands, with which they sprang up, each to speak in turn.' Havelock (with reference to the dispute between Agamemnon and Achilles) states: 'The performance of judgment is also a function of rhetoric: the one is achieved through the other, so that the sceptre is both a judge's symbol and a speaker's symbol.'
40 The sceptre, apart from its symbolism, was also a practical way of achieving order in the course of crowded debates, since only the carrier had the right to speak.
41 Translated by Macdowell (1978).
42 The translator (D.M. Macdowell) admits that lines 499−500 could be rendered: 'the one was claiming to have paid it in full . . . but the other was denying that he had received anything'.
43 This traditionalism extends from 'the inclination of composers of epitaphs to perpetuate traditional formulae and to use resounding Homeric epithets' [Dover (1974), p. 7], to the political nostalgia and search for the reestablishment of the *patrios politeia*, the ancestral constitution, which was 'always a Good Thing: the term *patrios politeia* silenced the critics and they could only retaliate by arguing that *their* ideal was the *true* ancestral constitution.' [Hansen (1991) p. 297]. As Hansen (1991), p. 296 notes: 'Like many Greeks, the Athenians had a soft spot for the "golden age", the belief that everything was better in olden times and that consequently the road to improvement lay backwards and not forwards.'

44 This tendency, evident in the archaic age and persistent until the classical one, had deep roots in the psychology and philosophy of the Greeks. An all-embracing solution will be offered in the course of the next chapters.

45 Lanni (1997), p. 188 recaps scholarly assumptions: 'It is often assumed that the spectators at Homeric and Hesiodic dispute settlements were the precursors of the classical Athenian juries. MacDowell, for instance, writes that the "speakers haranguing the crowd on the shield of Achilles [. . .] are forerunners of the orators who addressed the Athenian juries", and Humphreys examines Hesiod and Homer in an attempt to map "the transformation of the crowd into a jury" in Attica.'

46 Arist *Politics* [1269a] refers to a 'quite absurd' ancient law from Cumae of Magna Graecia: 'for example, at Cumae, there is a law about murder, to the effect that if the accuser produces a certain number of witnesses from among his own kinsmen, the accused shall be held guilty'. This certainly reflects a period during which social peace and stability mattered more than justice, but also reveals the difficulty of gathering evidence in order to solve a case.

47 Arist. *Politics* [1326b 15–20]: 'in order to decide questions of justice and in order to distribute the offices according to merit it is necessary for the citizens to know each other's personal characters, since where this does not happen to be the case the business of electing officials and trying law-suits is bound to go badly; haphazard decision is unjust in both matters, and this must obviously prevail in an excessively numerous community'. (πρὸς δὲ τὸ κρίνειν περὶ τῶν δικαίων καὶ πρὸς τὸ τὰς ἀρχὰς διανέμειν κατ᾽ ἀξίαν ἀναγκαῖον γνωρίζειν ἀλλήλους,ποῖοί τινές εἰσι, τοὺς πολίτας, ὡς ὅπου τοῦτο μὴ συμβαίνει γίγνεσθαι, φαύλως ἀνάγκη γίγνεσθαι τὰ περὶ τὰς ἀρχὰς καὶ τὰς κρίσεις. περὶ ἀμφότερα γὰρ οὐ δίκαιον αὐτοσχεδιάζειν, ὅπερ ἐν τῇ πολυανθρωπίᾳ τῇ λίαν ὑπάρχει φανερῶς.); cf. Wolff (1946), p. 38: 'Jolowicz compared the Homeric "*istor*" to the English jury in its most primitive form, when it was not yet a body of men who decided on the ground of the evidence laid before them, but a group of neighbours who gave their verdict on the ground of their own knowledge of the facts involved . . . Jolowicz's comparison certainly fits in with Iliad 23.486, where Agamemnon is called upon by Idomeneus and Ajax to act as an umpire familiar with the facts, as he is himself one of the spectators, in their controversy over the result of a chariot race. It is also in complete agreement with the etymological meaning of the term *istor*, and there can be little doubt that it applies as well to the *istor* who appears on the shield of Achilles.'

48 Face-to-face society is supported by: Finley [1973] 1985, p. 17 and (1983): pp. 28−9 and 82; Hunter (1994), pp. 96–119; Cohen D. (1991), pp. 155−6; Whitehead (1986), p. 69. For a contrary view see Cohen E. (2000), pp. 105ff.

49 See Lanni (1997); on the incorruptibility of masses as opposed to less numerous panels of expert judges see Arist. *Politics* [1286b26−35], and *Ath. Pol*. 41.2; cf. Neel (1994) at p. 108; Mirhady (2006).

50 Arist. *Ath. Pol*. 3.4.

51 Cf. Lanni (1999), p. 29; legal expertise as suspicious and as incentive for sycophancy is discussed by the majority of legal historians and classicists (an indicative list would include Lofberg (1976), Christ (1998a), Macdowell (1978), pp. 62−66; Osborne (1993); Harvey (1993); Harris (1999).

52 For instance, Humphreys (1983) suggests that this partisan crowd was the precursor of the mass juries.

53 The issue of 'amateurism' is dealt with in more detail in Chapter 2.

54 See Gagarin, (1986) p. 19, n.2.; cf. West (1966), pp. 40−8; Janko (1982), pp. 228−31 places Hesiod's works in the first half of the seventh century.

55 Tr. Gagarin (1986), p. 24.

56 Ibid. at n. 25.

57 Roth (1976) recognises that in this passage the king's 'unerring speech and gentle words are an integral part of his work as an arbitrator. The king's judicial function is

actually at least as prominent in this passage as his oratorical performance'. She goes as far as to suggest that the gift of the Muses to the kings was the memorisation of an oral collection of legal rules, which formed the basis of their judgment (p. 336): 'If every citizen was obliged to remember the laws, a judge must have had a more specific obligation to remember them accurately. Memory, then, was an essential faculty for an early Greek judge.' Such a verdict, being welcome by an already educated community familiar with legal rules, would embrace the kings with broad respect. This thesis is criticised by Gagarin due to the absence of other literary evidence (particularly in Hesiod), but one way or another, both acknowledge the important role of the audience in the pressure they could exact on the judge. Gagarin (1986), p. 26; cf. Humphreys (1983), p. 237.

58 Griffith (1983), p. 57 suggests that the dispute is entirely a poetic fiction. Even in such a case, Hesiod is likely to have drawn a picture of the process for settling disputes using details familiar to his audience (cf. Gagarin (1986), p. 34, n.44).

59 Humphreys (1983), p. 231, recognising the importance of the public pressure, states that 'Works and Days (28−9) does not specifically state that the case was judged in public, but since listening to lawsuits was one of the diversions of the idlers in the agora, it seems likely that there was an audience. He hopes to reach a wider audience with his grievances by expressing them in poetry: he has no confidence in formal legal institutions.' She even finds in this passage traces of the primal transformation of an audience into a jury.

60 Cf. *Works and Days* (276−80): 'Zeus established the following way of life [*nomos*] for men: whereas for fish and beasts and winged birds it is the custom to eat one another, since there is no law [*dike*] among them, to men he gave law, which is by far the best thing.'

61 Cf. Gagarin (1986), p. 47: 'This opposition has a general aspect, namely the contrast between observing and violating the norms of the society, and a more specific aspect referring to the observation or violation of rules for the proper operation of the legal process.'

62 Cf. Arist. *Nic. Eth*. 1167a−b.

63 Cf. Arist. *Rhet.* 1415b3−5.

64 E.g. Janko (1982), p. 143; Papakonstantinou Z. (2007), p. 83.

65 Cf. Gagarin (1986), p. 40; MacDowell (1978), p. 148; for the tendency of the prosecutor to transform a dispute into a legal case and of a defendant to offer a wider background and context, see Johnstone (1999).

66 Luban (1986), p. 289: 'The dispute between Apollo and Hermes is resolved by an amicable settlement and not a judgment. If we pose the dilemma: peace or justice? -then Zeus' answer is "peace".'

67 Cf. the role of Athena in the dispute between Agamemnon and Achilles, declaring the use of force unacceptable and urging Achilles to use words rather than his sword, in *Iliad* 1.210–11, discussed in Ch. 1.

68 Cf. Seaford (2003).

69 See Arist. *Nic. Eth.* [1137a32–1138a3]; See also Arist. *Rhet*. [1374a25–b23]; cf. Beever (2004).

70 However, such an absolute conclusion could be smoothed by the Athenian trials' *timesis* phase.

71 See for example Dem. 28.24. A more exhaustive account of this kind of argumentation will be offered in the course of this study; therefore indicative examples are offered here.

72 See for example Dem. 25.42.

73 Covert threats were possible and sometimes obvious at first glance, though such an explicit threatening argumentation would certainly produce the opposite result to the one aimed at. For certain, the inability of Athenian jurors to harm the whole polis (in contrast with the Furies' real threat) played a role; cf. Lys. 14.

74 See for example Dem. 25.32.
75 See for example both Demosthenes' and Aeschines' efforts to reveal the opponents' contact with (condemned for treason) Philocrates in Dem. 18, 19 and Aeschin. 2 and 3.
76 Wolff (1946), p. 70; Harris (2000), pp. 76–7.
77 If my interpretation of the underlying philosophy behind decision making in archaic and classical trials is correct, similarities can be drawn between the Homeric judges' prize for 'straight dike' (as appears in the scene of Achilles' shield) and the 'jurors' pay' in Athens (a measure proposed by Pericles himself shortly after the reforms of Ephialtes). Therefore, at the same time as being a democratic measure for the facilitation of wider and indiscriminate participation in Athenian juries, jury pay may also symbolise an acknowledgement of every single Athenian juror's ability to reach a 'straight dike'. The jurisdiction of the archaic judges (offering their opinions in advance before deciding the best solution) passed to litigants, thus sliding over the last semi-professional participants of the system of justice. Finally, this last form facilitated the 'black or white' approach of courts, whereas the previous form, was retained in its most suitable sphere, that of arbitration.
78 Johnstone (1999) and Naiden (2004) have already plausibly suggested that this act on the part of Athenian defendants, apart from merely arousing the emotions of jurors, was also a practical way of ritualising and visualising their total submission to the Athenian demos and the will of the court.
79 E.g. Lanni (1999); Harris (2007).
80 Hdt. *Hist*. 1.100: 'In addition to this there were other practices he introduced: if he heard of any act of arrogance or ostentation, he would send for the offender and punish him as the offence deserved, and his spies were busy watching and listening in every corner of his dominions.'
81 Cf. Gagarin (1986), p. 25.
82 A similar system of justice operated in Egypt (Diod. Sic. 1.75–6) and the Greeks could not have been unaware of it.
83 Lanni (1997), p. 183 observes that 'the spectators played a crucial role in the social dynamic of the courts and had an important effect both on the litigants' arguments and on the jurors' decisions . . . the corona helped to rectify one of the perceived institutional weaknesses of the Athenian democracy, the immunity of its mass juries from formal accountability'; cf. p. 188: 'The corona may have served to rectify a perceived weakness in the Athenian democracy . . . the decisions of a jury could not be appealed and jurors were the only state officials not subject to an *euthyna* . . . The presence of bystanders may have served as an informal *euthyna* for jurors, since it insured that the jurors could not make collective judgments without the immediate knowledge of a section of the community.'
84 Lanni (1997).
85 Dem. 23.70; Antiph. 5.48.
86 Cf. Antiph. 5.14, 87–9; 6.2–4; Dem. 23.70–9.
87 IG I(3) 104.
88 Hansen (1976); Volonaki (2000).
89 Maybe in this Athenian traditionalism we may find an explanation of the absence of a public procedure for homicide (*graphe phonou*). Although Hansen (1976) 110–12 and (1981) 14–17 argues for the existence of such a procedure, the total absence of hard evidence makes it unlikely. Cf. Macdowell (1978), p. 175; Gagarin (1979), pp. 322–3.
90 Volonaki (2000), p. 174.
91 See Thomas (2005).
92 This is sustained by the Athenians' (whether or not accurate) beliefs regarding their written laws (e.g. Theseus' speech in Euripides' *Suppliants* 430–4: 'When the laws are written down, then both the weak and the rich have equal justice'). Thomas [(2005) n. 90 at p. 43] writes: 'What remains clear, however, is that by the classical period written law was widely regarded as *in itself* conducive to fairness, justice, and equality – not only democracy.' Such beliefs led the Athenians to respond to their

two short-lived oligarchic coups of 411 and 404 with an extended revision and re-inscription of their laws, and a law providing for the enforcement solely of written laws in the law courts.

93 Cf. Macdowell (1978), p. 45.

94 For an excellent study in the development of public recording in Athens see Sickinger (2007).

95 '*Thesmos* was a rule laid down or imposed by authority . . . whereas *nomoi* were generally accepted rules of behaviour . . . by the fourth century *nomos* was the normal word for a statute, a law published in writing and validated by a political process' Macdowell (1978), p. 44. The usual Athenian word for law in the seventh or sixth centuries was *thesmos*, but *nomos* in the fifth and fourth. Ostwald (1969) suggests that the substitution of *nomos* for *thesmos* was a deliberate act of policy by Cleisthenes as part of the establishment of democracy in 507 BC.

96 For instance, Wolff (1946), pp. 82ff. says about the procedure of '*anakrisis*': 'in an epoch when a well-established judicial system, by requiring written plaints and peaceful summonses, had long succeeded in eliminating force as a means of seeking the realisation of rights, the *anakrisis* none the less still reflected the function of the archaic official, who maintained the peace of the community by inhibiting arbitrary acts of self-help and arranging for a judicial control of its use'; cf. the procedure of '*epidikasia*': 'The right to employ self-help might be beyond doubt, and then it was the duty of the public authority to lend it its backing. This too is reflected in an institution of the classical legal system of Athens; and here the original function of the magistrate is even more clearly visible, since it resulted in a lawful use of self-help by virtue of a mere provisional permission of the archon. This was the *επιδικασία*, an act through which the archon, upon request, allowed heirs who were not descendants, and as such domestic successors, of the deceased to take possession of the latter's estate; an *επιδικασία* decree was also issued for him who claimed the hand of an heiress as her closest kinsman. The *επιδικασία* was an administrative act based on police power, not a judgment.'

97 Cf. Harris (2009).

98 A lot of passages from the Attic orators verify this point, namely that in public suits (*graphai*) one was more free to use extra-legal argumentation than in other types of suits, and this will be discussed in due course.

99 Hom. *Od*. 12.438−40: ἦμος δ' ἐπὶ δόρπον ἀνὴρ ἀγορῆθεν ἀνέστη κρίνων νείκεα πολλὰ δικαζομένων αἰζηῶν; cf. Herodotus' story of Deiokes.

100 The framework of what was received as 'relevant' and why in the age of the orators has been treated in the Introduction.

101 Lycurgus for instance, prohibited the recording of laws, on the grounds that they would be more secure if they were implanted in every citizen's memory and way of life (Plut. *Life of Lycurgus* 13).

102 Cf. Rhodes (2004).

References

BEEVER A. (2004) 'Aristotle on Equity, Law and Justice', *Legal Theory*, 10 (1), 33−50.

BERS V. (2009), *Genos Dikanikon: Amateur and Professional Speech in the Courtrooms of Classical Athens*, Hellenic Studies Series (Book 33), Center for Hellenic Studies: Harvard.

BONNER R.J. and SMITH G. (1930−8), *The Administration of Justice from Homer to Aristotle* (2 Vols), Chicago: Greenwood Press.

CALHOUN G.M. (1962), 'Polity and Society: The Homeric Picture', in A.J.B. Worthington and Frank H. Subbings (eds), *A Companion to Homer*, 431−52, London: Macmillan.

CAREY C. (1994), 'Rhetorical Means of Persuasion', in I. Worthington, ed., *Persuasion: Greek Rhetoric in Action*, 26−45, London: Routledge.
CARTLEDGE P., MILLETT, P. AND TODD S. (eds) (1990), *Nomos: Essays in Athenian Law, Politics and Society*, Cambridge: Cambridge University Press.
CHRIST M.R. (1998a), *The Litigious Athenian*, Baltimore: Johns Hopkins University Press.
——— (1998b), 'Legal Self-Help in Defence of the Oikos', *American Journal of Philology* 119, 521−45.
COHEN D. (1991), *Law, Sexuality, and Society: The Enforcement of Morals in Classical Athens*, Cambridge: Cambridge University Press.
COHEN E.E. (2000), *The Athenian Nation*, Princeton, N.J.: Princeton University Press.
COLE T. (1991), *The Origins of Rhetoric in Ancient Greece*, Baltimore, MD; London: Johns Hopkins University Press.
DOVER K.J. (1974), *Greek Popular Morality in the Time of Plato and Aristotle*, Indianapolis; Cambridge: Hackett (1994), [originally published: Oxford: Blackwell, c.1974].
EDWARDS M.W. (1991), *The Iliad: A Commentary*, V, Cambridge: Cambridge University Press.
FINLEY M.I. ([1973] 1985), *The Ancient Economy*, (revised ed. 1999), London: University of California Press.
——— (1983), *Politics in the Ancient World*, Cambridge: Cambridge University Press.
FOXHALL L., LEWIS A.D.E. (1996), *Greek Law in its Political Setting: Justifications not Justice*, Oxford: Clarendon Press.
FREDAL J. (2001), 'The Language of Delivery and the Presentation of Character: Rhetorical Action in Demosthenes' *Against Meidias*', *Rhetoric Review*, Volume 20, Nos. 3/4, 2001, 251−67.
GAGARIN M. (1979), 'The Prosecution of Homicide in Athens', *Greek, Roman and Byzantine Studies* 20, 301−23.
——— (1986), *Early Greek Law*, Berkeley: University of California Press.
——— (2003), 'Telling Stories in Athenian Law', *Transactions of the American Philological Association*, Volume 133, Number 2, Autumn 2003, 197−207.
——— (2005), 'The Unity of Greek Law', in M. Gagarin and D. Cohen (eds), *The Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press.
GERNET L. (1965), 'Thucydide et l'histoire', Annales. *Economies, Societes, Civilisations*, 20, 570−5.
GRIFFITH M. (1983), 'Personality in Hesiod', *Classical Antiquity* 2: 37−65.
HANSEN M.H. (1976), *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi, and Pheugontes: A Study in the Athenian Administration of Justice in the Fourth Century B.C.*, Odense: Odense University Press.
——— (1991), *The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology*, Oxford: Blackwell.
HARDING P. (1994), 'Comedy and Rhetoric', in I. Worthington (ed.), *Persuasion: Greek Rhetoric in Action*, London: Routledge, 196−221.
HARRIS E. M. (1999), 'The Penalty for Frivolous Prosecutions in Athenian Law', *Dike*, 2, 123−42.
——— (2000), 'Open Texture in Athenian Law', *Dike*, 3, 27−79.
——— (2007) 'Did the Athenian Courts Attempt to Achieve Consistency? Oral Tradition and Written Records in the Athenian Administration of Justice', in C. Cooper (ed.), *Politics of Orality*, Leiden: Brill, 343−70.

——— (2009), 'What are the Laws of Athens About? Substance and Procedure in Athenian Statutes', *Dike*, 7/8, 2009/2010.

HARVEY D. (1993), 'The Sycophant and Sycophancy: Vexatious Redefinition', in P. Cartledge, P. Millett and S. Todd (eds), *Nomos: Essays in Athenian Law, Politics and Society*, 103−21, Cambridge: Cambridge University Press.

HAVELOCK E.A. (1978), *The Greek Concept of Justice: from its Shadow in Homer to its Substance in Plato*, Cambridge, MA: Harvard University Press.

HUMPHREYS S. (1983), 'The Evolution of Legal Process in Ancient Attica', in E. Gabba (ed.), *Tria Corda, Scritti in Onore di Arnaldo Momigliano*, Como, 229−56.

HUNTER V. (1994), *Policing Athens: Social Control in the Attic Lawsuits, 420–320 B.C.*, Princeton, N.J.: Princeton University Press.

JANKO R. (1982), *Homer, Hesiod and the Hymns: Diachronic Development in Epic Diction*, Cambridge: Cambridge University Press.

JOHNSTONE S. (1999), *Disputes and Democracy: the Consequences of Litigation in Ancient Athens*, Austin, TX: University of Texas Press.

KARP A.J. (1977), 'Homeric Origins of Ancient Rhetoric', *Arethusa* 10, 237−58.

KENNEDY G. (1963), *The Art of Persuasion in Greece*, London: Routledge and Kegan Paul.

——— (1980), *Classical Rhetoric and Its Christian and Secular Tradition from Ancient to Modern Times*, London: Croom Helm.

LANNI A. (1997), 'Spectator Sport or Serious Politics? *Hoi periestekotes* and the Athenian Lawcourts', 117 *Journal of Hellenic Studies* 183.

——— (1999), 'Precedent and Legal Reasoning in Ancient Athenian Courts: A Noble Lie?', 43 *American Journal of Legal History* 27.

LLOYD-JONES H. (1971), *The Justice of Zeus*, Berkeley: University of California Press.

LOFBERG J.O. (1976), *Sykophancy in Athens*, Chicago: Ares Publishers Inc.

LUBAN D. (1986), 'Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato', 54 *Tennessee Law Review* 279, 1986−7.

MACDOWELL D.M. (1978), *The Law in Classical Athens*, London: Thames and Hudson.

MARTIN R. (1989), *The Language of Heroes: Speech and Performance in the Iliad*, Ithaca: Cornell UP.

MIRHADY D. (2006), 'Aristotle and the Law Courts', *POLIS* 23.2.

MONDI R. (1980), 'ΣΚΗΠΤΟΥΧΟΙ ΒΑΣΙΛΕΙΣ: An Argument for Divine Kingship in Early Greece', *Arethusa* 13, 203−16.

NAIDEN F. S. (2004), 'Supplication and the Law', in E.M. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, 71–91, London: Duckworth.

NEEL J. (1994), *Aristotle's Voice: Rhetoric, Theory and Writing in America*, Southern Illinois University Press.

OSBORNE R. (1993), 'Vexatious Litigation in Classical Athens: Sycophancy and the Sycophant', in P. Cartledge, P. Millett and S. Todd (eds), *Nomos: Essays in Athenian Law, Politics and Society*, 83−102, Cambridge: Cambridge University Press.

OSTWALD M. (1969), *Nomos and the Beginnings of Athenian Democracy*, Oxford: Clarendon Press.

PAPAKONSTANTINOU Z. (2007), 'Legal Procedure in the Homeric Hymn to Hermes', *Revue Internationale des droits de l'Antiquité* LIV, 83−110.

RHODES P.J. (2004), 'Keeping to the Point', in E.M. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, London: Duckworth, 137−58.

ROTH C.P. (1976), 'The Kings and the Muses in Hesiod's *Theogony*', *Transactions of the American Philological Association* (1974), Vol. 106 (1976), 331−8.

SCHMITZ T. (2000), 'Plausibility in the Greek Orators', *American Journal of Philology*, Volume 121, 47−77.

SEAFORD R. (2003), 'Aeschylus and the Unity of Opposites', *The Journal of Hellenic Studies*, Volume 123 (2003), 141−63.

SICKINGER J. (2007), *Public Records and Archives in Classical Athens*, Chapel Hill: The University of North Carolina Press.

THOMAS R. (2005), 'Writing, Law, and Written Law', in M. Gagarin and D. Cohen (eds), *The Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press.

TODD S.C. and MILLETT, P. (1990), 'Law, Society, and Athens', in P. Cartledge, P. Millett and S. Todd (eds), *Nomos: Essays in Athenian Law, Politics and Society*, Cambridge: Cambridge University Press.

TOOHEY P. (1994), 'Epic and Rhetoric', in I. Worthington (ed.), *Persuasion: Greek Rhetoric in Action*, London: Routledge, 153−75.

VOLONAKI E. (2000). '*Apagoge* in Homicide Cases', *Dike*, 3, 147−76.

WEST M.L. (1966), *Hesiod. Theogony*, Oxford: Clarendon.

WHITE J.B. (1985), *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*, Chicago: University of Chicago Press.

WHITEHEAD D. (1986), *The Demes of Attica, 508/7 – ca. 250 B.C.: A Political and Social Study*, Princeton, N.J.: Princeton University Press.

WOLFF H.J. (1946), 'The Origin of Judicial Litigation among the Greeks', *Traditio*, Volume 4, 31−87.

2 Incentives for wide use of character evidence in the Athenian legal system

Characteristics of the Athenian legal system as incentives for wide invocation of character evidence

The purpose of this discussion of the Athenian legal system is not to give a detailed account of its institutions and procedures; that is an undertaking beyond the scope of the present study. On the contrary the focus will be on some key aspects and idiosyncrasies of the Athenian legal system that relate to, and to an extent facilitated, the wide use of character evidence in Athenian courts. As is suitable for a study of ancient Greece, this chapter follows an inductive method of reasoning. By reference to different relevant concepts and examples, a partial explanation of the wide use of character evidence in Athenian courts will be extracted. In what follows, an enumeration of the system's relevant general characteristics and a classification of the types of procedures and charges will be linked to the relevance of character evidence in Athenian courts.

The democratic nature of the system

The first aspect to be highlighted is the democratic nature of the system. As in all its institutions and constituents, the Athenian legal system was consistent in its pursuit of strict democracy. Equality in the opportunities for participation, by demolishing the barriers of birth and wealth, signified a right for each Athenian citizen to participate in every public business. By the same token, all Athenians could participate in the process of adjudication. Each year, any male citizen over the age of thirty could put himself forward and be selected by sortition as one of the 6,000 jurors that manned the Athenian courts. Private cases were decided by a democratic jury of at least 201 members, public ones by at least 501, a number that in most serious cases was multiplied and (though extremely rarely, if ever) could extend to all 6,000 jurors. Verdicts were taken by majority vote, without the guidance and aid of any legal experts and judges, or the opportunity for formal deliberation among jurors. Aristotle says that the ballot of the courts was a major contributing factor to the creation of democracy. When the demos took power over the courts, magistrates' powers were curtailed so as to allow for common people to increase their influence.[1] As a result, litigants were obliged to convince large panels

acting as representatives of the body of the 30,000 or so Athenian citizens. Therefore any argument they used and, in particular, any evidence from character they invoked should conform to the mentality of the polis and its communal norms.[2] This could only be proved by reference to multiple examples of past deeds which highlighted the person's adherence to communal values and his development of respective character traits.

The ideology of amateurism

Directly connected with the democratic nature of the Athenian legal system, is the pervasive ideology of amateurism, or the 'complete absence of professionals or experts'.[3] In essence, the interconnection of these two characteristics lies in the Athenian belief that 'professionalism and democracy were regarded as, at bottom, contradictory'.[4] The facilitation of wide participation by laymen through the introduction of measures such as state pay, annual rotation in most public offices, and sortition between nominees, added to the absence of competent state machinery, such as a Director of Public Prosecutions or police, means that cases were initiated and pursued to their end by private individuals. These features were deeply entrenched in the democratic ideology of the polis, to the extent that legal professionals were seen with suspicion and hostility.

The importance of this characteristic of the Athenian legal system when seen as an incentive for the wider use of character evidence can be traced by analogy, in particular with modern English criminal law. Drawing from research on the development of the English criminal process from the mid-eighteenth to the late twentieth centuries one can sketch 'a broad movement from ideas of responsibility as founded in character to conceptions of responsibility as founded in capacity'.[5] During this process

> as confidence in substantive evaluations of character diminished, yet as demands for legitimisation increased, the criminal process was in search of a conception of criminal responsibility which could be explicated in legal, technical terms, and hence legitimated as a form of specialist knowledge underpinning an impersonal mode of judgment. The full articulation of such a system depended, however, on a number of other institutional features which developed only slowly from the late eighteenth century on: an adversarial trial dominated by lawyers; a sophisticated law of evidence; a further professionalization of legal practice.[6]

By contrast, the Athenians never felt the pressing need for such an 'impersonal' mode of adjudication or for the legitimisation of democratic court verdicts through formalisation and expertise. The majority vote in the Athenian democracy was always self-evidently legitimate. In parallel, an Athenian composite idea of responsibility had been developed based on 'status' (the expectation of adherence to behavioural standards as a result of being a citizen) and 'personality' (the expectation to act responsibly as a human being, notwithstanding the distinct dispositions

and traits). The total lack of professionalism is merely the – astonishing – sign of these approaches.

The results of this pervasive amateurism can be observed in divergent fields and stages of adjudication. For example, litigants, with (in principle) minimal help from legal experts or speechwriters, conducted research into the relevant laws and decrees, and they largely decided the strategy and presentation of their cases. Therefore, the amateur litigant faced a number of challenges; either to rely entirely on legal documents and technical issues (which could trigger the suspicion of the audience) or to concentrate on narrative and extra-legal argumentation. Either way one ought to keep a balance, since an adversary lurked to expose the opponents' weaknesses.

The amateurism of the system is also highlighted by the slim limitations on the presence of allegedly partisan witnesses and supporting speakers, whose aim was predominantly to promote the parties' interests.[7] Nonetheless, any generalisation could be misleading and caution is needed in the treatment of the role of witnesses in Athenian courts. Their function has been interpreted as highly biased, yet certain safeguards existed in order to ensure their compliance with the requirement to attest to the truth of alleged facts. Violation of this rule or non-appearance at the trial could trigger a prosecution against them (*dike pseudomarturion*) or alternative safeguarding procedures such as *exomosia*, *kleteusis* and *dike lipomarturiou*. Moreover, in cases of false witnessing, their (written from circa 380 BC onwards) testimonies could be used as evidence in a subsequent trial against them. Although these mechanisms may have limited the presence of untruthful partisan witnesses (this may be partly proved by the fact that there are rare attacks against their characters to undermine their credibility and trustworthiness), the lack of coherent and formalised legal rules allowed for uncertainty in that field.[8]

Third, the ideology of amateurism in the Athenian legal system led the protagonists to neglect any systematic and professional treatment of legal rules. The Athenians, departing from the idea of expertise, regarded law as grounded on common sense and being the common property of the citizens. As a result, diachronically, laws could be interpreted at will, provided that the interpretation could conform to the common perception of the jurors. The imprecise rules of evidence and admissibility could not have escaped the same fate. Certainly, at least in homicide cases before the Areopagus, litigants were obliged to speak only to the charge in question; this rule possibly had effect in the popular courts as well, especially in private cases.[9] Nevertheless, such a compact rule could be vulnerable to contradictory interpretations. The accusatorial nature of Athenian courts and the amateurism of participants meant that litigants could exploit the rule of relevance to their advantage and make use of a more liberal interpretation of the 'speak to the point' clause. This in turn could facilitate an expansive use of character evidence relating either to the issue of guilt (in the form of propensity evidence) or to the trustworthiness and credibility of the speakers. In theory, therefore, the absence of any exclusionary rules means that the rule of relevance could have been transformed into a black hole, an all-inclusive clause, vulnerable to subjective interpretations as to its meaning.[10]

Furthermore, the lack of formalisation in almost every part of the system (no strict legal precedence, no official detailed record of past decisions, no *ratio decidendi* etc.) allowed for divergent interpretations of court verdicts. As a result of this relative uncertainty, defendants thought it necessary, in addition to a precise reply to the legal charges, to offer a more general account of their lives in an effort to increase their chances of success by advertising their characters' credibility and by provoking the audience's goodwill. Evocation of character evidence was considered necessary in order to offer a complete speech. As Todd, somewhat excessively, notes: 'the way to success in an Athenian court is to use all your available artillery'.[11]

How the rule of relevance (i.e. that litigants should speak to the point) could be enforced is even more complicated. Again, the absence of a professional expert or judge responsible for the direction of the jury as to the admissibility of evidence led this enforcement to be effected, presumably, by the disapproval of the audience.[12] This *thorubos* (tumult) could take place in dicastic and non-dicastic settings and could originate from the panel of jurors itself or from the spectators watching the legal case from the *corona.*[13] Bers, in the most informative study on dicastic *thorubos*, concludes that 'fairly early in the fifth century *thorubos* was common at large official meetings'.[14] In the dicastic context, there could be positive and negative reasons for the uproar. A speaker could ask the jury to confirm or disprove a story or a fact[15] or he could incite the jurors to interrupt, limit or control the speech of the opponent (presumably due to the latter's irrelevant argumentation).[16] In Dem. 45, Apollodorus asks the jurors:

> Let him not, then, leave this and talk about matters regarding which I am not suing him; and do you, if he is so shameless, refuse to permit it (Dem. 45.50).

In fact, Apollodorus himself had already been the victim of dicastic *thorubos* as he mentions earlier in his speech. He claims (no matter how much he overdramatises) that his opponent:

> by reading these documents and making other false statements which he thought would favour his case . . . made such an impression on the jury that they refused to hear a single word from me. I was fined one-sixth of the amount claimed, was denied the right of a hearing, and was treated with such contumely as I doubt if any other man ever was, and I went from the court, men of Athens, taking the matter bitterly and grievously to heart (Dem. 45.6).

Thus, the panel's (more or less fair) spontaneous negative reaction to a litigant's argumentation could cause disturbances and pose a serious problem to the smooth delivery of his speech.[17] In anticipation of this, Hyperides tells the jurors:

> Just as you have allowed my accusers to conduct the prosecution as they wanted, so allow me to deliver my defence, to the best of my ability, in the manner I choose. Don't interrupt me, asking, 'Why do you tell us this?' Don't

> add anything of your own to the prosecution's arguments but rather listen carefully to my defence[18] (Hyp. 1, fr. 2).

The dicastic *thorubos* was the most efficient method of keeping litigants' rhetoric to the point. Nonetheless, this self-regulating mechanism of the court could be ineffective. Probably, it would carry with it the pros and cons of large bodies with their mass psychology. Despite the fact that Athenian juries were largely experienced in listening to lengthy and eloquent speeches, the oral delivery, the lack of exclusionary rules of evidence, and the absence of any kind of deliberation[19] before the vote could presumably make them disregard any inconsistencies in the litigants' argumentation, allowing room for extraneous issues and for being swayed by irrelevant information. An anecdote from Plutarch (*On Garrulity* 504c), illuminates the matter:

> Lysias had given to a certain accused criminal an oration of his own writing. He, having read it several times over, came to Lysias very much dejected, and told him that, upon his first perusal of it, it seemed to him to be a most admirable piece; but after he had read it three or four times over, he could see nothing in it but what was very dull and insipid. To whom Lysias, smiling: What, said he, is not once enough to speak it before the judges?

Absence of burden and standard of proof

Closely connected to the dominant ideology of amateurism is the absence of a theorised formal concept of the burden of proof (*onus probandi*). The lack of professionalism left its mark in this field too; in the Athenian jurisprudence we find nothing similar to the Latin maxim: '*semper necessitas probandi incumbit ei qui agit*'.[20] Yet, in practice, Athenian litigants generally followed the rule that the introducer of an assertion or fact has the duty of proof. In principle, the burden felt on the claimant from the original initiation of the proceedings. In the *anakrisis* he had to follow the procedural rules in order to establish that his case was *eisagogimos* by providing all the evidence he planned to present at the trial, placing it in the *echinos*, and proving that there was an alleged breach of a specific law.[21] The defendant had to follow a similar procedure in order to counter the prosecutor's allegations and both of them were obliged to take an oath (*antomosia*).

Until that point, the burden remained on the side of the prosecutor, with the written plaint setting the legal point that had to be proved. In support of this, the fact may be adduced that the prosecutor spoke first in the court. However, if the defendant wanted to block the prosecutor's case, he could make use of a special plea (in the form of *paragraphe*, *diamarturia* or *antigraphe*). Then the burden was shifted and it was for the defendant to prove his alleged points as to why the prosecutor's case was inadmissible. In that case, the defendant spoke first in the hearing.

The best example of this shift of the burden of proof can be found in *paragraphe* cases where a defendant objected to a *dike emporike*.[22] In order for the prosecutor

to initiate his case, he should present a valid contract for shipment to or from Athens that was allegedly breached. Up to that point, the burden of providing this contract fell on the prosecutor. However, if the defendant denied the existence or the validity of such a contract, he could initiate a *paragraphe*; then, the burden shifted on his side in order to prove his allegations. Therefore, although the concept of the burden of proof was underdeveloped and uncodified, some procedural and practical rules substantiated it in loose terms.

Nonetheless, any resemblance to an elaborate concept stops at this point. There was no division between a legal and an evidential burden of proof, in addition to the uncertainty as to the requirements for the establishment of a *prima facie* case.[23] Although the written plaint limited the scope for irrelevant evidence and set a common ground for argumentation (with the most cases concerning factual disputes, thus the facts requiring presentation of evidence were more or less specified), there was a call for both parties to make the best of their cases, using all the legitimate means at their disposal. One significant aspect was their resort to extra-legal argumentation. Hence, the absence of a concrete concept of the burden of proof could be regarded as an incentive to a wider use of such argumentation. Both parties shared an equal evidential burden and were under the obligation of a total attack against their opponent's allegations by providing evidence to prove their alleged facts and disprove their opponent's. Furthermore, the fact that it was a battle of words between the parties signified a need to increase their credibility and diminish their opponent's. To recap then, it can be plausibly suggested that the Athenian concept of the burden of proof (if there could be extracted anything close to this) bears a closer resemblance to its modern counterpart in civil cases (where the law retains a neutral position in relation to litigants), with the requirement that whoever presents a fact or an allegation is the one who carries the responsibility of proof.

Hand in hand with the burden of proof comes the concept of the standard of proof. This can be defined as the degree of certainty or probability which the evidence must generate in the mind of the tribunal of fact in order for the party bearing the burden of proof to gain a favourable verdict. In modern English jurisprudence, this level of proof varies between civil and criminal cases. In civil cases, a case is decided 'on the balance of probabilities'[24] whereas in criminal cases the standard is proof 'beyond reasonable doubt'[25] so that the jury are 'sure of guilt'.[26] Although the definition of the terminology is far from unambiguous in Anglo-American law, there is at least some guidance for the fact-finders to follow.[27] In Athenian law, the absence of such a concept signified an uncertainty as to the expected proof of the allegations in the written plaint. The absence of *ratio decidendi* and of any deliberation between the jurors before the verdict allows for a penumbra of subjectivism surrounding the passing of court verdicts. In other words, evidence that could have satisfied the subjective level of proof required by a particular Athenian juror might have been less conclusive for another who had set an equally arbitrary higher standard of proof.

This uncertainty as to the required standard of proof induced Athenian litigants to escalate the rhetorical battle in order to prove their case as convincingly as

possible. They opted for setting the standard of proof to the highest level in order to convince even the most suspicious jurors. This could be effected by using any relevant or remotely relevant argument at their disposal and by taking a wide approach to extra-legal argumentation in order to damage the opponent and his credibility. Each litigant raised the stakes, with character evidence providing a significant weapon in his armoury. Moreover, a litigant (especially the prosecutor who spoke first) might (in the absence of opposition by the jurors) resort to irrelevant pleas about his opponent in order to direct, delimit and partly control the latter's reply. In simple words, the prosecutor, by presenting irrelevant facts or allegations not included in the written plaint, placed the burden of disproving them on the defendant and, potentially, raised the standard of proof for him by demanding a multilevel refutation. Usually, these new allegations concerned the opponent's character[28] and presented him with the dilemma of either having to refute them, with the risk of alienating the jury by responding to irrelevant matters, or to disregard them, with the danger that they would be accepted by the court as true.[29]

To recap then, the Athenian amateuristic approach to justice precluded the formulaic development of the concepts of burden and standard of proof. The uncertainty as to who had the onus of proving the facts of the legal case and to what degree, provoked an even wider use of character evidence in an attempt to convince the undirected jurors about the verisimilitude of a story. This unpredictability as to how the jurors could be convinced triggered the introduction of even more facts and allegations of varying degrees of relevance and remoteness to the original dispute. These in turn called for a greater resort to extra-legal argumentation in order to be proved or refuted. Nevertheless, this point of doubtfulness should not be pressed too far since the Athenian law had developed safeguarding mechanisms to counterbalance the risks of this highly amateuristic approach.

Evading amateurism

The institutional structure and rules of the Athenian democracy in relation to the promotion of an amateur ideology of participation soon revealed the need for a more artful approach to public argumentation. Although there is some doubt as to the sociological background and the relative activity of different classes of Athenian citizens in the workings of the democracy, as far as the courts are concerned the figures are striking and the picture is clearer.

At least six thousand fully eligible Athenian citizens over the age of thirty (out of a total of approximately twenty thousand over that age in the fourth century)[30] nominated themselves for jury service to be selected by lot at the start of each year. The six thousand jurors of a particular year (since there was annual change to the composition of this panel due to a competition for places)[31] were eligible to show up on each particular court day, with these occurring between approximately 175 and 225 times per year (although a more conservative figure is more probable). The fact that a *graphe* hearing took the whole day and the time allotted to *dikai* varied according to the value of

the suit (with the suits for over 5,000 drachmas lasting more than two hours), a single active juror could decide tens or even hundreds of cases annually and thousands during his lifetime. Keeping in mind that this juror could also have served the Athenian democracy from other positions (such as magistrate or *bouleutes*, or as a simple spectator of the Assembly), he could theoretically be extremely qualified and experienced compared to modern jurors. Nonetheless, what he shared equally with his modern descendant was the ability to decide factual disputes by resort to lay common sense, not a particularly negative factor in principle.[32]

As far as the parties to these hundreds of lawsuits that reached the courts (and the many more that were decided at deme level or through arbitration) are concerned, Athenian ideology compelled them to retain the identity of *idiotai* throughout the proceedings. In theory, the initiation and conduct of both private and public cases should remain in private (amateur) hands, making it a punishable offence to pay someone else to appear as your advocate in court.[33] What is of particular interest to this study is the actual preparation of litigants' speeches and their delivery in the courts. The formidable experience of addressing mass juries, the usually high stakes of the legal cases, and the need for a professional legal and extra-legal preparation of a speech gave rise to the need for a focused expertise in speech-writing. In other words, the emergence of rhetoric as an art, the study of the psychology and response of mass juries to divergent kinds of argumentation and the more scientific method of approaching oral delivery called for (in theory, subtle) ways to evade the restrictions of amateurism. An amateur litigant, therefore, could resort to the assistance of a *synegoros* (or a team of *synegoroi*) or a *logographer* in order to make the most of his case.

A *synegoros* was usually a friend or relative of the speaker, who could adduce a valid reason for being given the time by the litigant to address the jury.[34] Personal interest in the case, affiliation with the speaker and enmity for the opponent were regarded as valid reasons, thus avoiding a financial or professional link with the litigant.[35] The frequency of the *synegoroi* appearance is a matter of controversy.[36] An even more significant figure is the one of the speech-writer (*logographos*).[37] Where a litigant had not studied the art of rhetoric and was inexperienced or uncertain of legal matters, and

> since for most people litigation was a unique or rare experience rather than a career, it was far more useful (if one could afford it) to obtain the advice and help of another kind of expert which flourished in the fifth century, the professional speechwriter (*logographos*).[38]

This shadow figure (not mentioned in the speeches but acting behind the scenes) could provide advice on how to present a case or even provide part or the whole text of a speech. The ancient Athenian logographer, unlike a modern advocate, 'had considerable latitude to exaggerate, suppress and even invent aspects of his story in order to make the best of his client's case'.[39] What we usually see in the

surviving speeches is, therefore, a refined version of forensic argumentation, interesting enough to have been published, very often revealing the elegant, though covert, touches of professionalism.

The adversarial nature of the system

An issue with serious implications for argumentation in forensic fora is the adversarial nature of the trials. As has already been noted, the absence of competent state bodies promoted an adversarial approach to legal cases. Disputes were transformed into legal charges and feuds were neutralised for the benefit of social order through their introduction in the non-violent sphere of adjudication. In conformity with the principle of party autonomy, the role of the court as adjudicator is essentially passive, limited to hearing the evidence and arguments presented by litigants. Litigation in this form takes the character of a contest or fight between opponents, each aiming to present his own case in the best possible light and to cause maximum damage to the case of the rival.[40] Aristotle had already observed that:

> The forensic kind [of speech] is either accusatory or defensive; for litigants must necessarily either accuse or defend (Arist. *Rhet*. 1358b).

> One must therefore make room in the hearer's mind for the speech one intends to make; and for this purpose you must destroy the impression made by the adversary. Wherefore it is only after having combated all the arguments, or the most important, or those which are plausible, or most easy to refute, that you should substantiate your own case (Arist. *Rhet*. 1418b).

Aggravated by the agonistic environment of Athenian society, litigiousness became the channel for the persecution of an adversary. As a result, a litigant finding himself in this adversarial context, using any means at his disposal, attributes to evidence from character a greater significance during the presentation of cases before mass juries. Argumentation ad hominem was an effective weapon in the quest for victory, especially in fora where credibility and trustworthiness were of utmost importance.[41] Aristotle notes that:

> Evidence partly concerns ourselves, partly our adversary, as to the fact itself or moral character; so that it is evident that one never need lack useful evidence. For, if we have no evidence as to the fact itself, neither in confirmation of our own case nor against our opponent, it will always be possible to obtain some evidence as to character that will establish either our own respectability or the worthlessness of our opponent (Arist. *Rhet*. 1376a).

Under such adversarial conditions, jurors usually have to choose between two different versions of the same story. Opposing parties struggle to prove their credibility, while at the same time diminishing the opponent's. Invocation of a trustworthy character may induce jurors to positively receive a litigant's pleas showing

him a high degree of goodwill. These have to count as contributing reasons for the vividness of narratives and the rich storytelling in the speeches of the Attic orators as well as the presentation of background, seemingly irrelevant, information.

The genuine difficulties in crime investigation

A further, substantial, issue to be taken into account is the era under consideration. Forensic oral argumentation has to be interpreted in the light of the insufficient, barely existent, methods of crime investigation and evidence collection.[42] Extra-legal considerations (character evidence, background information and contextualisation of the dispute in question) gain ground in Athenian courts, which relied heavily on issues of probability. This means that the general tendencies and character traits of litigants were (in theory) evoked in order to assist the jurors, following a deductive method of reasoning, to extract the truth. Subsequently, they could apply the law to the factual dispute that originated litigation. In other words, in the absence of hard evidence, 'the importance of this mode of argumentation will have reinforced the common-sense assumption that the plausibility of specific statements about an individual can be assessed with reference to his or her established patterns of behaviour'.[43] Most cases concerned factual rather than legal disputes. Arguments from probability were predominantly used to illuminate issues of fact.[44] So, Athenian litigants frequently highlight their arguments' probative value, with jurors having to evaluate them within a very uncertain environment.

Furthermore, the limited scale of the Athenian polis makes it unavoidable that (at least) some of the parties involved in litigation were already known. The direct evidence that survives in the form of forensic speeches (although to a great extent coming from upper class and high profile cases where litigants could afford the hiring of a speechwriter) reveals that, especially (but not only) in the case of distinguished individuals, one's character and mode of life, could become notorious by being circulated through gossip in advance of a trial. Whether or not Athens was a face-to-face society, the ethical homogeneity of its inhabitants is indisputable. This polis differed a lot from the modern industrial, socially fragmented and territorially vast (compared to Attica) states. This social and ethical homogeneity of Athens allowed for the identification of the predominant views as to acceptable communal morals and norms. Consequently, litigants were able to design their strategies, by knowing in advance the types of arguments that would probably provoke the goodwill of jurors. Complete adherence to communal norms was the ultimate character evidence and an unmistakable indicator of a litigant's personality.

In this adversarial and uncertain judicial environment, litigants' speeches (and their witnesses' depositions) posed as the sole source of information. Litigants ought to design a careful strategy and efficient tactics in order to enhance their personal trustworthiness and the believability of their words. Thus, apart from the factual considerations surrounding and to an extent inciting a wider use of character evidence, the issue of credibility has to be taken into account. In this battle of words between the two competitors, the effort to secure the jurors' goodwill was

great. Adding to this the limited flexibility open to jurors in the issue of sentencing, it was a matter of utmost importance for a litigant to provide all the necessary evidence which could tip the balance in his favour.[45]

The flexibility of the system

Before proceeding to conclusions, account should be taken of the outstanding flexibility of the system. Apart from the elasticity offered by the lack of strict adherence to legal precedents or the absence of *ratio decidendi* for legitimising the majority verdicts, one more peculiar feature can be added. The Athenian legal system allowed for the presence of many different procedures for prosecuting the same act. Presumably, a procedure could be chosen by the plaintiff as better suiting the circumstances of his specific case. The reasons offered for the presence of this special characteristic of the Athenian legal system include: the democratic tendency of providing equal and uninhibited access to the courts[46] and the flexibility offered to the prosecutors by allowing them to calculate the risk;[47] it offered a solution to the problem of enforcement in a system which relied on the volunteer.

All these rationales are valid explanations of the matter. Yet one more could be added, which can be seen as the uniting factor of all the aforementioned. This was the Greek idea of 'character' and 'personality' and the relationship of the person with the community. The Greeks understood human beings and 'personhood' in a way different to ours. The 'objective-participant' model of the self (as described by Gill)[48] provides the key for a better understanding since it offers the most suitable model of interpretation. An ancient Athenian understood himself as an integral part of the community, wholeheartedly adhering to its ethical norms. His highest goal was to act in harmony with the particular 'role' assigned to him in the society, and the attainment of virtue lay in the accomplishment of this task in the best possible way.[49] But how did this characteristic – the flexibility – of the Athenian legal system provide an incentive for further use of character evidence?

The description of this feature is offered by Demosthenes (22.25–7):

> Moreover you should grasp this fact, that Solon, who framed these and most of our other laws, was a very different kind of legislator from the defendant, and provided not one, but many modes of procedure for those who wish to obtain redress for various wrongs. For he knew, I think, that for all the citizens to be equally clever, or bold, or moderate folk, was impossible. If, then, he was going to frame the laws to satisfy the moderate man's claim to redress, many rascals, he reflected, would get off scot-free, but if he framed them in the interests of the bold and the clever speakers, the plain citizen would not be able to obtain redress in the same way as they would. But he thought that no one should be debarred from obtaining redress in whatever way he can best do so. How then will this be ensured? By granting many modes of legal procedure to the injured parties. Take a case of theft. Are you a strong man, confident in

> yourself? Arrest the thief; [. . .] you are [only] risking a thousand drachmas. Are you rather weak? Guide the Archons to him, and they will do the rest. Are you afraid even to do this? Bring a written indictment. Do you distrust yourself, and are you a poor man, unable to find the thousand drachmas? Sue him for theft before a public arbitrator, and you will risk nothing. In the same way for impiety you can arrest, or indict, or sue before the Eumolpidae, or give information to the King-Archon. And in the same way, or nearly so, for every other offence.

The truth of this assertion is examined by Carey (2004), and his conclusion is that it is for the most part accurate (specifically that an Athenian could choose between different procedures of varying risk in cases of, for example, assault, rape, guardianship, theft etc.) provided that some adjustments are made.[50] Osborne observes that Demosthenes in fact leaves a whole dimension out of the question. The procedure followed determined the consequences for the defendant as well as the prosecutor.[51]

The implications of this feature and its connection with character evidence may be highlighted. The first is noted by Demosthenes himself: human beings are unequal in respect of their internal and external characteristics. The level of cleverness, boldness and skilfulness differs among individuals and this has to be taken into account by the legislator. This divergence is even more apparent in the case of status, wealth and power. Therefore it is assumed that the procedure chosen reflects the individual characteristics of the parties. In other words, there has to be a perfect match between the 'person' of the litigant and the 'procedure' he chooses. The personal characteristics have to be (and in a great degree are) presented before the Athenian jurors (in the form of character evidence) in order to explain the procedural choice. For example, the insolent, wealthy and powerful Meidias in Demosthenes 21 has to be punished for hubris. In his case, a lesser punishment would not suffice and would simply make him more hostile and thus more dangerous to the people. Therefore, the choice of a *graphe hubreos* perfectly suits his characteristics. On the other hand, in Demosthenes 54, the young and inexperienced prosecutor could not pursue a risky and demanding public prosecution, as this would have been above his powers. He offered a justification based on stereotypical assumptions about youth and inexperience, which is a well-attested pattern of argumentation in Athenian courts. On the surface of it, this pattern aimed at inspiring the sympathy of the audience and preventing any suspicion of sycophancy. On a second level, it can be connected to the procedural choice. A litigant's deeds, the choice of a charge or procedure included, had to conform to his 'role' and personality.[52] In other instances, natural strength could be invoked as a personal characteristic for the choice of a process which involved the arrest of a criminal in cases where this was permitted.[53] So, suspicion and questions could arise where this process had failed or was not pursued. Also, as Aristotle observes (*Rhet*. 1372a) questions may arise if 'a man wanting in physical strength were accused of assault and battery, or a poor and an ugly man of

adultery'. The choice of the procedure or the charge had to comply with the role and the character of litigants.

Also, the status of the defendant determined the risk that a prosecutor would be willing and able to take. An excuse of inability to find witnesses due to the intimidation of the defendant's personality and power is attested in the speeches.[54] As a result, a safer course of action should be followed. The dangers posed for the prosecutor by a failed public prosecution, contrasted to the financial benefits of a successful private one, could induce him to pursue, wherever possible, the latter path. In contrast, a prosecutor, calculating the weakness of a defendant, could choose the procedure most suitable to his aims. The prosecutor in Lysias 14 asks for the extermination or banishment of Alcibiades the Younger since his weakness and skills rendered him harmless and unable to inflict any harm on Athens.[55] Calculation of risk and benefit, determined by the individual characteristics of the parties, seems to be central in the Athenian approach to justice. As a result, these characteristics should be communicated to the jurors and wide invocation of character evidence seems inescapable.

Autonomy of the courts

Finally, in order to complete the picture of this unusual (to modern understanding) system of justice, another substantial aspect has to be considered: specificity. The Athenian approach to justice differs from the modern view in which the autonomy of the courts is seen as a sine qua non of a fair trial. The dominant definition of this term relates to the concept of the separation of powers and entails the absence of interference of the other branches of government in the workings of the judiciary. However, other interpretations of court autonomy are more closely related to this study and, potentially, serve as further incentives to the wide use of character evidence.

The first concerns the internal autonomy of the courts, i.e. the autonomy which a panel of judges enjoyed in relation to other panels and their decisions. The absence of formalism and professionalism in the Athenian system of justice produced the underdevelopment or total absence of the legal rule of *ratio decidendi*, the concept of binding precedent, and the principle of *stare decisis*. Consequently, a particular panel of jurors had unlimited discretion in reaching a verdict. This, in conjunction with the limited flexibility of the court in proposing the sentence in most trials, triggered the wide use of character evidence, giving to litigants a further opportunity to win the goodwill of the jurors, to enhance their credibility and, at the balance, to win a favourable verdict.

Second, although the Athenian court was in principle sovereign and its decisions were unappealable, it did not enjoy total autonomy and separation from its sociopolitical environment. As Carey notes and as is widely true

> over and above any practical reasons for the inclusion of such material, the most important factor is cultural. Whereas most modern systems surround the law court with artificial rules and barriers designed to treat the individual

case in isolation, the Athenians viewed the trial within the lives of the parties, the judges and the community as a whole.[56]

The aforementioned factors contributed to the attested wide approach of Athenian courts to character evidence. Even though character evidence was considered by the Athenians as relevant to the legal case, it nonetheless served the aforementioned secondary rhetorical and cultural purposes as well. Each particular juror was acknowledged as competent and as deserving the autonomy to decide on the relevance and the importance of each piece of evidence.[57] Litigants had to act accordingly.

Arguably, one could identify two acceptable forms of character evidence:

1) First, those involving arguments directly relevant to the offence in question that tend to reveal a specific propensity, which would increase the probability of committing the specific crime.
2) Second, those involving more general arguments about a litigant's life, illuminating the personality of the party, revealing merit, credibility, character traits and dispositions.

In principle, a litigant should rely solely on the first set of arguments at the guilt phase of the trial, while mentioning the second during the sentencing phase.[58]

The currently proposed absolute (sometimes reductionist) equalising of individuals, translated in the courtroom as absolute equality before the law (meaning that one has to stand totally stripped of any distinguishing personal factors enjoyed due to, for example, status, merit, or life), results in the prohibition of litigants' invocation of any merit from their lives outside the courtroom, retaining the realm of the courts as autonomous from the socio-political sphere. This narrow view taken by modern law, means that character evidence should be invoked solely through arguments directly relevant to the legal case or concerning the reputation of the litigant. Persons from the litigant's immediate environment are called to testify on the question. In addition, the modern approach allows only for the invocation of similar past offences (or a criminal past) in order to portray a litigant's character. Contrastingly, in classical Athens argumentation from character could take many forms. These included a litigant's reputation among the wider public, opinion and circumstantial evidence, and particular past events highlighting personality traits. All these would usually be inadmissible in modern courts.

However, the above factors tend to create a misleading account of Athenian courts. They tend to picture them as promiscuous fora, incapable of delimiting litigants' argumentation, reaching ad hoc and inconsistent decisions. On the contrary; the Athenians were fully capable (albeit apparently unwilling sometimes)[59] of instituting elaborate and unambiguous procedures. For instance, the court of the Areopagus with its highly respected and solemn processes was widely received as the most scrupulous tribunal in Greece.[60] In particular, the Areopagus had stricter rules governing forensic argumentation which did not apply to the popular courts.

The conscious decision concerning the latter, namely that both forms of character evidence (1 and 2 above) are acceptable in a courtroom, allowed for the development of informal and empirical rules of relevance that governed the invocation of both directly relevant, and (seemingly) extraneous character evidence. This approach becomes evident in the consistent patterns of argumentation that Athenian litigants followed and in the themes they chose to highlight.[61] By the same token, the rarity of arguments from private life [apart from those directly relevant to the offence belonging to category (1)], and the frequency of invocation of particular themes from public life showing adherence to communal norms, prove the Athenians' regulation of the issue.

Procedures as further incentives

An interesting and intriguing factor, inherent in the Athenian legal system, is the nature of Athenian laws and procedures that facilitated the wide use of character evidence. The open texture of legal statutes and the wide range of admissible (or even required) evidence, together with the semi-autonomous sphere of Athenian courts (which sometimes seemed to intertwine with the political sphere), forced litigants to design their rhetorical strategies in such a way as to encompass a non-provocative, carefully designed positive sketch of their personalities. Sometimes, when the charges themselves were designed to require a deeper examination of one's general behaviour and mode of living, litigants legitimately concentrated on evidence from character.

Legal procedures were divided into public (*graphai*) and private (*dikai*), classified by whoever had the right to initiate proceedings for legally actionable wrongs. Apart from these 'normal' procedures, there were some 'extraordinary'[62] ones, which although having a public character (in the sense that they were initiated by *ho boulomenos*) and designed to correct public wrongs, could not accurately be classified under the category of *graphai*. Two of them were largely political, designed either to protect the citizen body from potential usurpers of political rights (*dokimasiai*) or concerned with the accountability of magistrates and public officials for their actions while in office (*euthunai*). The distinctiveness of these procedures lay in the fact that they de facto concerned the whole citizen body for mainly political and not strictly legal reasons. Anyone could initiate proceedings and any public official was accountable. According to Hansen, every year the Council had to handle 509 *dokimasiai* and the courts at least 700.[63] The same several hundreds of magistrates (in the wider sense, including the *bouleutai*) had to undergo the process of *euthunai* at the end of their tenure. This process included a thorough examination of the officials' financial record and any malpractice alleged against the official. This procedure was the citizens' first and foremost weapon for holding his magistrates accountable.[64] The Athenians' obsession with countering corruption and their fierce political antagonism, coupled with their litigiousness and competitiveness, are just some logical reasons for assuming that several cases ended up in court.

Graphai *and* dikai

In public cases (*graphai*), character evidence and personal behaviour was more important in making a case.[65] With the reservation that each litigant's opinion is biased (in the sense that he tries to fit his rhetoric to his case) the following evidence has some seeds of truth (or at least, since it was argued before a large audience, plausibility). Demosthenes states that jurors in private cases (*dikai*) focus on the issue at hand; in public ones, they decide in accordance with the spirit and the norms of the state and for the honour of the ancestors.[66] This argument complies with the evidence suggesting that the rule of relevance, i.e. the requirement to speak to the point, concerned *dikai*. This is endorsed by Plato who, in the *Laws*, provides for two types of trials: one, when a private person accuses a private person of injuring him and desires to gain a verdict by bringing him to trial, and another when a person believes that the State is being injured by one of the citizens.[67]

Moreover, in Lysias 30, the prosecutor objects[68] because defendants in public cases (as opposed to private ones) proceed to win a case by counter-accusations and irrelevant considerations. However, proving the random and biased rhetoric of Athenian trials, in the same case, the very same person in the prologue of his speech asks to be allowed to present remotely relevant character evidence:

> There have been cases, gentlemen of the jury, of persons who, when brought to trial, have appeared to be guilty, but who, on showing forth their ancestors' virtues and their own benefactions, have obtained your pardon. Since, therefore, you are satisfied with the plea of the defendants, if they are shown to have done some service to the State, it is fair that you should also listen to the accusers, if they show forth a long course of villainy in the accused (Lys. 30.1).

Apart from trial considerations, and since (as it has already been noted) Athenian courts did not enjoy total autonomy from their society, the interpretation of the acceptable degrees of relevance depended on external considerations as well, such as the particular circumstances of the period. Regarding the influence of the prevailing circumstances, the speaker of Lysias 30 blames the opponent for behaving contrary to the public interest. He states that his opponent

> also knew that whenever the Council in a given year has enough money for its administration, it does no harm, but whenever it is reduced to desperation, it is forced to accept impeachments (*εισαγγελίαι*), to confiscate the property of the citizens, and to allow itself to be persuaded by those of the orators whose advice is most corrupt (Lys. 30.22).

Such a tendency to condemn rich citizens and confiscate their wealth could indeed be dangerous for the whole system, albeit a not assessable one. Hansen notes that it probably pertained mainly to crisis periods.[69] In support, he cites the

Third Oration of Hypereides, which was delivered in the period of peace after the settlement of 338. This speech offers three examples of how the Athenian courts did *not* fall into the temptation of condemning a number of rich mining-concessionaires, although the accusers' proposals for confiscation were very tempting.[70] On the other hand, another source maintains that in those very same years the richest of all the mining-concessionaires, Diphilos, was condemned to death and executed, and his fortune of 160 talents distributed among the citizens.[71] If such a tendency in periods of crisis indeed existed, its implications for character evidence are obvious. In addition to his innocence concerning the strict legal case at hand, a rich litigant had to convince the jury of his value as a person, proving that his acquittal would be in the public interest due to his continuing to lavish benefactions on the polis. Furthermore, the above factors (his favourable disposition to the polis *and* his innocence) made him a person worthy of the jurors' pity.[72] These issues will be discussed analytically in the course of this study but, nonetheless, highlight at present the structural pressures and tensions that formed the Athenian approach to character evidence.

Sui generis *procedures*

The following procedures are referred to as *sui generis* in the sense that they fall outside the scope of the typical procedures of *dikai* and *graphai.*[73] The *dokimasia* and *diadikasia* will serve as indicative examples of procedures that, by their nature, induced litigants to a broad invocation of character evidence. As far as *dokimasia* is concerned, there is no consensus among scholars about the purpose of this procedure. Disagreement can be narrowed down to two trends. Some scholars assert that it was introduced to test a candidate's legal qualifications both as a citizen and for the office in question, mainly to protect the idea of 'citizenship' and the citizen body from unauthorised intrusions.[74] On the other hand, scholars suggest a deeper examination of a candidate's suitability for public office, recognising in the *dokimasia* 'a comprehensive enquiry, covering not only the candidate's legal qualification but also the probity of his life, both public and private'.[75] According to the evidence, the latter view seems to be closer to the truth. Apart from the direct evidence based on the surviving speeches, this conclusion is supported by the wider tendency of the Athenian legal system to allow broad invocation of character evidence. The structural design of the Athenian legal system was the result of a deeper belief in the relevance of argumentation from character; nonetheless, it also became an incentive and justification for its even wider use.

Dokimasia technically signified the formal judicial scrutiny of one's suitability for a particular civic role.[76] On a symbolic level it was the confirmation by the polis, either before the Council or the Court (or both in some cases), that a man was eligible for his registration on the citizen list,[77] for taking up public office[78] or for addressing civic bodies.[79] As Todd notes *dokimasia* was yet another 'procedure designed to protect the integrity of the citizen body from any intrusion by those who do not share the fullness of citizen privilege'.[80] Such an intrusion could take place for technical reasons (as in the case of a person whose parents were not both

Athenian citizens), but also for behavioural reasons (for instance, leading a disreputable life by prostituting oneself, squandering patrimony, abusing parents and so on).[81] Therefore the procedure itself (especially its second leg) instead of being narrow and specific, called for a wide use of character evidence. An objecting plaintiff could point to instances of misbehaviour according to citizen standards, in order to prove the unworthiness of the candidate. On the other hand, the defendant, by presenting evidence of good conduct (or providing for the absence of any reprehensible activities), could win the goodwill of the jury and gain a favourable verdict. Such argumentation is evident in all surviving cases of *dokimasia*, either concerning scrutiny for public office or for addressing the assembly. Litigants themselves, recognising this fact, state that in cases of *dokimasia* a more general account of the defendant's life is under question.[82] *Dokimasia* is essentially an investigation of one's behavioural record and

> although in other trials it is appropriate to defend oneself simply on the charges, in dokimasiai it is fair to give an account of one's whole life.[83]

In order to understand the seriousness of the procedure, the importance of civic participation for the citizens of classical Athens has to be kept in mind. In a purely legal context, this procedure meant that every single year hundreds of Athenians[84] were obliged to undergo this scrutiny. In addition to this number, the compulsory annual rotation of public officers and the prohibition against holding any allotted public office twice in a lifetime (apart from the office of *bouleutes*) certify the major importance of this procedure which concerned the majority of the citizenry. In practical terms, this means that the *dokimasia* was the first (compulsory) contact of an overwhelming percentage of Athenians with the city's judicial process. Adding to this account the *dokimasia* of young (*ephebes*) Athenians for the acquisition (or formal recognition) of citizenship, it can be safely concluded that all citizens were educated in legal matters in such a way as to consider the scrutiny of behavioural traits as reliable evidence in the quest for truth.

Although, presumably, to a certain extent the procedure remained a formality, there is still evidence of cases that eventually ended up in court. According to Aeschines, the law specifically provided for the scrutiny of anyone who was to be in charge of any state business for more than thirty days or anyone who was to preside over a court. In the corpus of Lysias, at least five of the thirty forensic speeches concern charges initiated during a *dokimasia* for public office. Additionally, according to the procedure of *dokimasia rhetoron* (scrutiny of orators)[85] anyone deciding to address the Assembly (or a popular court)[86] could be called for a *dokimasia*,[87] in the form of a challenge initiated by anyone who wished (*ho boulomenos*), in order to test his eligibility. Aeschines' *Against Timarchus* is a good example of how this procedure could be used (or abused) in order to disqualify a potential opponent and strip him of his political rights. In all these cases, a general examination of a defendant's character and past behaviour was required.

On the other hand, *diadikasia* is the 'only private extraordinary procedure'.[88] It was initiated by a private individual in order to secure a claim, yet in the eyes of the

law he was not received as the prosecutor, nor was the opposing party the defendant. In fact all parties, since there could be more than two rival claimants, were treated on equal terms. This is best exemplified by reference to an actual inheritance dispute [Dem. 43.8−10], where five claimants were competing to secure a claim on a particular estate. Cases were decided by a first-past-the-post system rather than by absolute majority and this is yet another indication of their extraordinary nature. Furthermore, the procedure of *diadikasia* conferred no absolute rights to the winning claimant. For instance, in inheritance cases (where *diadikasia* was widely used) it solely proved that the winning party had a better title to the estate than that put forward by his defeated opponents. If a new challenger disputed the winning claimant's rights, the case could be re-opened and re-examined.

The procedure of *diadikasia* by its nature called for an immediate, though relative, victory against a rival, (sometimes more than one rival). There were no allegations concerning a breach of a particular law, nor was the content of the litigants' argumentation contained by the specific charges written on the plaint. Disputes, especially in inheritance cases, mainly concerned factual matters rather than disagreements about the meaning of the law. Usually, the argumentation of litigants focused on the validity of an adoption or a will. Due to the limitations posed by the inadequate methods of scientific proof regarding such issues, litigants' rhetoric relied heavily on arguments from probability. Aggravated by the potential multiparty clash, each party sought to supply the court with sufficient primary (relating directly to the legal case) and secondary (relating to the credibility of the parties) reasons in order to decide in his favour.

The nature of the verdict in a *diadikasia* (first-past-the-post) transformed the normal strategy of litigants' argumentation (i.e. proof as to the points mentioned in the written plaint), focussing on a proof relative to the other parties' position. Ultimately, there was no need for a claimant in a *diadikasia* to convince the court as to the truth of his case per se but, unlike a *dike* or a *graphe*,[89] he needed to appear more convincing to the court than his opponents did. Wider invocation of (positive and negative) character evidence served exactly this purpose.

Specific charges as further incentives

In order to reveal the wide spectrum of offences that followed an open texture and favoured a broad approach to character evidence, reference to specific examples of legal charges will be made. In this context, 'open texture' signifies the lack of formalism of the Athenian jurisprudence, and its resulting abstention from developing detailed definitions of its legal terminology.[90] The wording of legal statutes has to be, in principle, clear and unambiguous in order to allow limited scope to judges for innovative interpretations.[91] The same approach to legal statutes was taken by the Greeks as well, yet in the recognition that the effort of the law-maker to predict and cover all future cases might prove futile and infeasible.[92]

As a result, the specific wording of legal statutes could cause disputes about the meaning of the law, especially aggravated by reference to key words open to interpretation. Thus, litigants' effort to prove their legal case included a suggestion

as to the definition of legal terminology. In order to support their conclusions and show that the opponent breached the particular legal statute in question, they proceeded to a wide invocation of character evidence to prove that, in addition, his conduct contravened the spirit of the laws. For instance, the meaning of the word '*hubris*' which signified a particular offence (*graphe hubreos*) was interpreted by reference to the intent of the lawgiver and the spirit of the laws. A more liberal or strict interpretation could change the litigants' argumentation and strategy.[93] This factor could be an incentive to the speaker to offer further character evidence in order to demonstrate that the opponent's act, sometimes deduced from his more general behaviour, opposed the deeper, 'hidden' behind the literal interpretation, meaning of the statute. To illuminate this issue, reference is made to examples from forensic speeches.

Examples of graphai

In this section, reference will be made to the political offence of the *graphe paranomon* (public prosecution against illegal decrees) and to the 'criminal' offence of the *graphe hubreos* (public prosecution for insolent, dishonouring assault). Both allowed or even called for a wide use of character evidence.

As mentioned above, the charge of *graphe hubreos* relates to acts of hubris. The substantive elements of this offence are not free from controversy among scholars. Presumably, the essence of hubris is to be found in the mental state of the perpetrator and / or in his intentions with respect to the social status of the victim.[94] According to Carey 'it is difficult to avoid the conclusion that hubris had a subjective (intention / mind-set) as well as an objective dimension (the fact of assault)'.[95] The subjective dimension gave to the *graphe hubreos* its 'open texture', making it more challenging for a litigant to prove. In order to demonstrate the perpetrator's mind-set, a prosecutor could resort to wider invocation of character evidence. As a result, the perpetrator's general disposition could become the focus of the trial as much as the objective element of the actual assault.

In addition, if the plaintiff was required to prove a degradation of his dignity and status, his own disposition and way of life could be called into question as well. To make it plain, the intention of the perpetrator to inflict insolent assault was to be found in his mind, with evidence from character illuminating the case (specifically his past behaviour which proves a propensity to commit such acts). The degradation of the victim was to be found in his social status and / or his respectable, non-provocative character. Both examinations facilitated the invocation of character evidence. In modern counterparts this brings to mind a particular defence or mitigatory allegation for defamation where the court recognises that the claimant's reputation and position in the community is so poor that any comment would be incapable of further defamation.[96] Litigants had to argue for this.

Maybe the most famous speech in the context of *graphe hubreos* is Demosthenes 21. Although it is disputable whether this speech was actually delivered in court, it nevertheless gives valuable evidence as to the Athenian approach to the

offence.[97] The whole speech focuses on Meidias' portrayal as a wealthy, insolent oligarch who chafed under democratic and social norms.[98] His particular behaviour during this episode, illuminated Meidias' general traits: before the assault, Meidias harassed Demosthenes in every way possible, he destroyed his festival chorus costumes, he tried to corrupt the officials and the judges, 'he bawled and threatened, standing beside the umpires as they took the oath' (Dem. 21.17). These were simply the incidental signs of Meidias' more general disposition, as revealed in his behavioural comparison with certain stereotypical patterns. He spoke loudly and often, getting his way with bribery when shouting didn't work, and when all else failed, with threats and intimidation.[99] In Demosthenes' words

> if for nothing else, yet for those harangues that he delivers at every opportunity and for the occasions that he chooses for them, he would deserve the severest penalty (Dem. 21.202).

On the other hand, Demosthenes' honour was affected, not only due to the insolent public assault in the crowded theatre, but also due to his own democratic and peaceful character: the exact opposite of Meidias. His patience and adherence to the norms of the polis are reflected in his conduct at the time of the assault. His decision to 'repay' through a speech rather than a punch, encapsulates his devotion to acceptable public norms. The initiation of proceedings proves his desire to protect weaker individuals from Meidias' insolent treatment. It is the character and personality of such weak men that runs the greatest risk of being maltreated:

> It is exactly the weakest and poorest of you that run the greatest risk of being thus wantonly wronged, while it is the rich blackguards that find it easiest to oppress others and escape punishment (Dem. 21.123).

Meidias' characteristic contempt for acceptable behavioural norms and Demosthenes' loyalty to democratic and cooperative ideals were as much at issue as the violent act itself. Both parties' characters were relevant to the charge. Hubris offers thus a good example of an incentive to broader – justified – invocation of character evidence.

The *graphe paranomon* was the main juristic weapon in the struggle for dominance between high-profile individuals in the Athenian agonistic political arena. According to the surviving evidence it was a very frequently used charge.[100] It could be initiated by *ho boulomenos* from among Athenian citizens, by an allegation under oath that a particular decree was illegal. The accusation was either that the decree was unconstitutional, formally or materially, or that it was undesirable and damaging to the interests of the people.[101] Adverse judgment in a *graphe paranomon* had a twofold consequence: the arraigned decree was thereupon null and void and, if the case was brought within a year from the decree's enactment, the proposer was punished.[102]

What is of interest here in relation with this offence is its highly political nature in addition to the idea of 'public interest'. Many of the surviving speeches

concentrate on the fact that the decree in question is not just technically unconstitutional but also damaging to the interests of the demos. A convenient and usual method of proving this, apart from the obvious type of argumentation relating to its future disadvantageous consequences, was also the negative character portrayal of the proposer. However Demosthenes, in questioning this approach in maybe the most famous and perfect forensic oration of classical Athens (Demosthenes 18: *On the Crown*) stated:

> I suppose that our ancestors built these law-courts not that we should assemble you here to listen to us abusing one another with scandalous accounts of our private lives, but that we may convict someone if he has offended against the city.[103]

Character evidence in Athenian courts concentrated mainly on the public (and especially political) behaviour of litigants. Therefore, a tested method of convincing the jurors to cancel a decree was first to question its proposer's intentions. A series of past harmful proposals, a dishonest disposition, and a propensity to reject as a person the polis' conventional ethical and political norms, constituted the usual arsenal at the plaintiff's disposal against the character of the proposer.[104] These same considerations were taken into account in the similar offence of *nomon me epitedeion theinai*, to the extent that Demosthenes advises the jurors to

> have regard also to the disposition of the man; for the law which he has had the audacity to propose is significant of his character (Dem. 24.138).

It is interesting to note the inconsistency of Demosthenes' argumentation in order to suit his own ends, but this is far from atypical in Athenian courts. Yet, the issue of the *graphe paranomon* remained strictly legal (and highly technical), with any effort to argumentation from character being supplementary to the main cause of proving the illegality of the decree.

This attested method of attacking the proposer's character in order to question his intentions and thus reject the decree per se is supported and partly explained by reference to a frequent target of *graphai paranomon*: grants of citizenship and honorary decrees.[105] In cases of naturalisation of aliens who had allegedly proved their merit through their services to the city, in addition to the proposer's character, the recipient's one was at issue. In fact, Athenian appraisal for citizenship led to the official legal provision that citizen rights must correlate with worthiness. In the speech against Neaera it is cited that:

> there is a law imposed upon the people forbidding them to bestow Athenian citizenship upon any man who does not deserve it because of distinguished services to the Athenian people . . . the law permits to any Athenian who wishes to prefer it an indictment for illegality against the candidate, and he may come into court and prove that the person in question is not worthy of the gift, but has been made a citizen contrary to the laws. And there have

> been cases ere now when, after the people had bestowed the gift, deceived by the arguments of those who requested it, and an indictment for illegality had been preferred and brought into court, the result was that the person who had received the gift was proved to be unworthy of it, and the court took it back. To review the many cases in ancient times would be a long task; I will mention only those which you all remember: Peitholas the Thessalian, and Apollonides the Olynthian, after having been made citizens by the people, were deprived of the gift by the court (Dem. 59.89).

Therefore, it is an obvious inference that merit proven through character and past behaviour was the central issue of these charges, always in accordance with the provisions of the law.

Examples of dikai

As we have already seen, *dikai* were legal procedures initiated by private individuals in cases concerning private disputes. In principle, this could serve to limit the invocation of character evidence to issues of guilt or to issues of credibility. However, the public nature of Athenian litigation induced litigants to widen the perspective of private disputes and argue for a broader impact of their particular case, so as to make it a matter of concern for the city as a whole. Grounding his assertions on character evidence, a prosecutor (although arguing a private case) could present his opponent's conduct as dangerous for the entire community. A defendant could respond by presenting his opponent as equally harmful to the polis, as a sycophant, a malicious prosecutor having ulterior motives.[106] In some cases, the flexibility of procedural choice for a prosecutor induced him to rhetorically argue for the aggravated charge (usually a *graphe*) and *a fortiori* prove the lesser charge he chose to bring (the present *dike*). In order to exemplify the aforementioned points, two cases of *dike aikeias (*private suit for battery) and a *dike blabes* (private suit for damages) will be examined. In the first set of cases, priority will be given to the factors of procedural flexibility and the prosecutors' effort to transform a *dike* into a public matter, while in the latter case the focus will shift to the 'open texture' of a *dike* statute.

The first set of cases is Isocrates 20 (*Against Lochites*) collated with Demosthenes 54 (*Against Conon*). Both cases concern *aikeia* where the prosecutor had to prove that the opponent was the first to strike and, also, anticipate the defendant's attempt at 'making light of the injuries received' (Isoc. 20.5).[107] In both cases, the speakers do not limit their argumentation to simply proving these points. They insist that a *graphe hubreos* would have been just as readily available in view of the defendant's behaviour (Dem. 54.1; Isoc. 20.2, 4, 5).[108] Therefore, despite the fact that the prosecutor (due to his moderation) chose to bring a private suit, the issue was nonetheless a public one.

Portraying the character of the defendant, the prosecutors demonstrate his contempt for the laws and for the citizen body, transform the case into a public matter and call for his punishment (Isoc. 20.11, 20). The defendant's general characteristic

conduct increases the likelihood of breaching the particular law of *aikeia*. After all, the defendant's characteristic contempt for the intent of the lawgiver and the spirit of Athenian laws is evident. The fact that the unprovoked attack did not lead to greater misfortunes is solely due to the speaker's temperance (Isoc.20.8). If people like Lochites and Conon (who are proved to have a *hubristic* character) are allowed by the court to continue their reprehensible behaviour (and it is certain that they will as their character proves), then the mere *aikeia* will escalate and reach homicide (Dem. 54.17−19; Isoc. 20.8).[109]

Dike blabes (private suit for damages) is the most frequently attested private procedure in the works of the Attic orators.[110] It applies to a variety of cases concerning damages, presumably due to its open texture and the absence of separate, more specific and better defined actions. The unifying idea under the term '*blabe*' was its application to instances where 'action or inaction caused (especially material) harm'.[111] Such instances included breach of agreements and contractual obligations (e.g. Dem. 48; Hyp. 3), damages to property (Dem. 55), or maladministration of a trust (Dem. 38).

Demosthenes 39 is a test case where the prosecutor, exploiting the open texture of the term '*blabe*', seeks to apply it to non-material or potential damage to be suffered in the future.[112] In this case, the dispute arose between two half-brothers, Mantitheus and Boeotus. Their father, Mantias, died before Boeotus reached the age of majority and could be registered on the list of citizens in his *deme*. Boeotus took advantage of this event and had himself registered under the name of Mantitheus (Dem. 39.5). His half-brother protested about this and, in the absence of a more specific procedure, brought a *dike blabes*. Nevertheless, if this private action was to be applied to his case, Mantitheus had to convince the judges that the term '*blabe*' could extend beyond its normal interpretation of 'physical damage to some material object' (e.g. Dem. 55.12, 20, 28), so as to include acts that 'simply cause some annoyance or might cause inconvenience in the future'.[113]

In order for Mantitheus to convince the judges, he had to prove that the likelihood of potential future harm was immense. Apart from merely mentioning what hypothetical situations might cause him or the state damage or annoyance (Dem. 39.7−18), he needed to provide compelling reasons for saying that Boeotus would in all probability take advantage of them. Hence, Boeotus is presented as a meddlesome person, associated with a gang of blackmailers (Dem. 39.2, 13, 25, 34) who, quite often, finds himself in court. This increases the likelihood of being convicted in a trial and being forced to pay fines. Consequently, in case of confusion between the two Mantitheuses, sons of Mantias, this could cause material damage to the speaker who might find himself obliged to go to court to clarify the matter. Additionally, Boeotus had recently faced charges for evasion of military service (39.16−17) and had been defendant in certain suits (39.19). Apart from the dangers originating from this aspect of Boeotus' character, he did not stop short of interfering with Mantitheus' life to the extent that he had laid claim to the office to which the Athenians elected the latter (39.19). Finally, the confusion around the persons under the name Mantitheus, son of Mantias, could (taking into account Boeotus' reprehensible conduct) damage the speaker's reputation among

the polis. Consequently, Boeotus' character was invoked to prove Mantitheus' case (as was allowed by the 'open texture' of the offence) as to the likelihood of future and hypothetical harm. Nevertheless, the Athenian court rejected this liberal interpretation of the term '*blabe*', no matter how probable (by reference to Boeotus' character) future damage appeared.

Examples of sui generis *legal cases (inheritance and* dokimasia rhetoron*)*

Earlier in this chapter we have seen how the procedure of *diadikasia* served as an incentive for a wider invocation of character evidence. In this section reference will be made to legal charges under this procedure in the form of disputes about inheritance. The aforementioned genuine difficulties in investigation and crime detection apply particularly to this category due to the regular disagreements as to the authenticity of the document presented as the deceased's will. In order to approach this question, the court had to evaluate the likelihood of each potential answer. This was influenced by the credibility of each particular claimant and by the probability of whether the document put forward as his will genuinely represented the testator's wishes.[114]

In inheritance disputes, claimants' argumentation primarily focused on the facts, since in most cases the legal context was straightforward.[115] Litigants never dispute the right of a legitimate son (natural or adopted) to inherit his paternal estate; but they do contest the legitimacy of a particular claimant or the validity of a particular adoption.[116] This, in turn, generated an excessive reliance on arguments from probability, particularly by reference to the burial of the dead and conduct of funeral rites, to feuds within the family (dating back to previous generations), and to extensive invocation of character evidence. The last was predominantly used to alter the equilibrium as to the relative credibility of the claimants (taking into account the first-past-the-post system of the verdict), but also to illuminate the facts of the case. In Isaeus 4 there is an effort to associate the opponent with a potential forgery of a contested will by reference to his past criminal record. Chariades, who was imprisoned for theft and absconded from Athens to escape justice on a subsequent charge, had all the characteristics of a would-be forger. On the other hand, the law-abiding and trustworthy citizens Hagnon and Hagnotheus would be more worthy recipients of the estate.[117]

Dokimasia rhetoron constitutes an indicative example of how a particular legal charge could be transformed into a general (deeply political) attack against a person's character and behaviour.[118] The case *Against Timarchus* (Aeschines 1) was brought as a counter-attack in order to damage Timarchus' chances of success in his prosecution of Aeschines. The latter argued that the defendant, Timarchus, had illegally addressed the assembly since his past reprehensible behaviour rendered him ineligible to do so. The allegation was that, in the past, he had prostituted himself and had squandered his patrimony. The law offered a list of acts that rendered a man ineligible to address the Assembly. Aeschines offers his account of these acts, which may not be exhaustive, but includes violence toward parents

or failure to support them, military derelictions, prostitution, and squandering an inheritance.[119] All these actions constituted offences that could be tried separately and incur the penalty of *atimia* (loss of citizen rights). Since such acts concern behavioural issues they interrelate with character evidence. Illegal (and morally reprehensible) behaviour should be proved by reference to character evidence and could turn the odds in the decision before an Athenian audience.

In order to support his argumentation, Aeschines directed his attack on the defendant's bad character. He focuses especially on specific allegations of indecency, in sharp contrast to the advertisement of his decency. The uselessness of Timarchus' character was inductively extracted by his reprehensible past acts and dictated the withdrawal of the honour of citizenship. The mere acknowledgement of this privilege connoted disgrace for the polis as a whole. On the other hand, Aeschines portrays himself as a person of dignity who acts, unsurprisingly, in the public interest. His speech, (as in most trials from classical Athens), is allegedly being given on behalf of the citizens.[120] The setting of this highly politicised public suit played a significant role in his effort to portray himself as a good citizen. In order to anticipate the obvious allegation of sycophancy against wilful prosecutors, Aeschines becomes the solemn prosecutor of indecency. Character evidence is indeed central in this quest. Furthermore, Aeschines' character assassination of Demosthenes (the supporting speaker for the defence) is noteworthy. Instead of deviating from the main charges, Aeschines willingly uses relevant accusations even against Demosthenes. In the course of the speech, the latter is portrayed as a pimp, homosexual, glutton and corrupt person, squanderer of his property, being himself a disgrace to the city. In that way he becomes Timarchus' alter ego rendering both undeserving of the jury's goodwill. On the contrary, they deserve condemnation. Timarchus was eventually punished with *atimia* (loss of citizen rights) and Demosthenes postponed the initial prosecution against Aeschines for three whole years.

Timesis

A further classification in Athenian law that is of interest for this study is the division of legal trials in *ἀγώνες τιμητοί* (charges for which the litigants put forward their proposals as to the evaluation – *τίμησις* – of the penalty) and *ἀγώνες ἀτίμητοι* (offences for which the penalty was fixed, as prescribed by law).[121] The procedure runs as follows: the trial is divided in two parts, each one ending with the jurors' vote. The first part (guilt phase) is constituted by the litigants' speeches as to the guilt or innocence of the defendant. After the court's decision on this matter, both litigants put forward their respective proposals (one each) as to the assessment of the penalty (sentencing phase). The trial ends with the jurors' vote, and the proposal receiving the majority vote is enforced. The normal process (probably) did not include any hints during the guilt phase regarding a litigant's evaluation of the sentence. Harrison notes the possible exception of litigants coming to terms as to the penalty in advance of the trial.[122] Todd refers to cases where a litigant could warn of his thoughts in advance.[123] Such behaviour is evident

in Aristophanes' *Wasps* (where in the trial scene the indictment also includes the *timema*); apart from comedy, it is also evident in the fragmentary speech of Deinarchos *Against Proxenos* (Dion. Hal. Dein. 3). The latter may be taken as a clue that reference to the *timema* in advance could function as a rhetorical ploy, hinting at the confidence of a litigant in his case. Scafuro, by reference to more passages from the Attic orators, offers another (speculative) suggestion, namely that there may have been a regular procedure of compromise on the penalty in *ἀγώνες τιμητοί*.[124] Either way, in both types of trials, jurors had little control over the penalty imposed.[125] This suggests that traces of the system of arbitration had intruded into the court system, allowing room for the discretion of the parties in reaching a compromise.

Aristotle (*Rhetoric* 1374; *Nic. Eth.* 1137b) had already recognised that arbitration is the suitable system for equitable and ad hoc justice, whereas the court system favours the rule of law. However, in some cases, statute penalties may be harsh and potentially unjust. The open texture of written laws (so as to cover general situations) and the inflexible application of the wording of a written statute allow neither for deeper insight into the details of each particular case nor for the evaluation of specific extenuating circumstances that could abate the harshness of a prescribed penalty. Furthermore, the adversarial nature of the Athenian courts tended to create winners and losers, with the potential danger of escalating the feuds to the detriment of the polis. The procedure of *timesis* was designed to perform this mollifying duty: it combines the two systems (arbitration and courts) in the search for proportionality.[126] Todd suggests that the function of *timesis* was to encourage both litigants to keep their proposals moderate, for fear of stampeding the jury into the opponent's arms.[127] Here, the paradigm of Plato's Apology, the 'only example of a speech that purports to have been delivered at the *timesis* phase'[128] is enlightening. Although Socrates was condemned by a narrow margin, both parties insisted on taking the matter to the extreme. The death penalty proposed by the plaintiffs was countered by a haughty, but ineffective suggestion on the part of the philosopher. The narrow margin widened and Socrates was condemned to drink the hemlock. Nevertheless, although enlightening, this case is atypical. In the majority of cases (especially in those decided by a narrow margin), the procedure of *timesis* would probably result in milder penalties or a compromise between the parties.

This brings us to the most direct relationship of *timesis* with character evidence and extra-legal argumentation. Harris[129] has offered a detailed analysis of this issue. His main thesis is that Athenian courts did not decide cases on political grounds and that extra-legal arguments, especially those concerning public services or status, did not influence the court's decisions about guilt or innocence. Contrastingly, such arguments were legitimately used during the *timesis* phase and could have a mitigating effect on the sentence.[130] Although I am convinced that the Athenian courts' verdicts were overwhelmingly based on legal issues, promoting thus the rule of law, my impression is that extra-legal argumentation could have a supportive (and highly probative) effect on a litigant's case, even during the 'guilt phase'. The extent to which such argumentation influenced the decision of

every single Athenian juror cannot be adduced with precision. The weaknesses of the evidence allow for nothing more than educated speculation. Nevertheless, the absence of surviving speeches delivered during *timesis* phase (except for one, the atypical Plato's *Apology*), the frequency of extra-legal argumentation both during the guilt phase of *ἀγώνες τιμητοί* and in speeches delivered in *ἀγώνες ἀτίμητοι*, and their (rarer but evidenced) invocation by plaintiffs, allow for an inference of a different and more central role for this practice. If the importance of such argumentation was reserved solely for the estimation of the wrongdoer's sentence, not one of the above would be so evident in the surviving literature. Nonetheless, the presence of the procedure of *τίμησις* was yet another incentive for broader invocation of extra-legal argumentation. It allowed for a more accurate estimation of the deserved penalty, due to both parties' appeal to mitigating or aggravating factors. Finally, it induced Athenian citizens to conform to legal and social norms, as the balance of probabilities ordained that in their lifetime they would inevitably have to adduce such behaviour in court.

Limitations to the incentives

Notwithstanding the above examples of some cases favouring a broader approach to character evidence, Athenian litigants were aware that this was not equally acceptable in all trials. Justice required them to speak to the point and stay clear of irrelevant statements.[131] Litigants were asked to argue on a specific legal charge, their argumentation (in theory) being restricted by the documented written plaint.[132] In order to argue a case effectively, they had to adjust their arguments (even those lying at the margins of relevance to the issue) in such a way as to destroy their opponent's legal case. However broad the notion of relevance might have been for the Athenians, the legal context obliged them to pay close attention to the matter. Aristotle emphasises that

> the law is the subject in forensic speaking; and when one has a starting-point, it is easier to find a demonstrative proof (Arist. *Rhet*. 1418a).

For this reason, he observes, even litigants who are at a loss for valid arguments can resort to attacks on the adversary, remarks about oneself, or attempts to arouse emotion. As long as they can present them as relevant to their case, any argument could be of some worth.

On the other hand, Aeschines, in anticipating Demosthenes' supporting speech in defence of Timarchus, warns the jurors that he,

> the clever speechwriter, will discover many irrelevant diversionary arguments, to the detriment of the city's system of justice.[133]

Relevance, apart from its strictly legal significance, had also acquired a practical one as a rhetorical weapon. Athenian litigants, whether or not respecting in practice the rule against irrelevant statements, in theory at least recognised it as

overwhelmingly valid. In Lysias 9, a defendant in an *apographe* (writ of confiscation) complains about the use of irrelevant character evidence against him. He says:

> What on earth did my opponents have in mind when they ignored the point at issue and sought to defame my character? Are they unaware that they are supposed to keep to the point? Or do they recognise this, but devote more attention to other matters than they should, thinking that you will not notice? . . . I would be surprised if they think that out of ignorance you can be persuaded by their slanders to vote for a conviction. I had expected that I would face trial on the basis of the indictment and not of my character (Lys. 9.1−3).

In homicide cases, the rule against irrelevant argumentation was purportedly stricter. The fact that the panel of jurors in the court of Areopagus (composed of former holders of the nine archonships) was more experienced than in other courts (composed by any allotted male citizen over the age of thirty), suggests that this rule was better observed. As early as Antiphon's speeches, it was seen as unacceptable to adduce irrelevant (according to their standards) material. In a defence speech for a charge of unintentional homicide the speaker argues that the prosecutor

> surely does not deserve your [i.e. jurors'] trust, but rather your disbelief, when in a case like this he directs his accusation to charges other than those that are the subject of his prosecution. I am fairly certain you would not convict or acquit someone for any reason other than the crime itself (Antiph. 6.10).

A similar respect for relevance is shown by Lysias in a speech before the Areopagus, where the defendant says:

> I wish I were allowed to demonstrate his wickedness by referring to other events . . . I shall omit everything else, but mention one episode I think you should hear about, as evidence of his outrageous audacity . . . [although] it is unlawful to mention irrelevant material in your court (*ἀλλ' ἐπειδὴ παρ' ὑμῖν οὐ νόμιμόν ἐστιν ἔξω τοῦ πράγματος λέγειν*) (Lys. 3.44ff).

Arguably then, in all cases and courts, litigants were aware that, to a greater or lesser degree, they ought to keep to the point and avoid irrelevant argumentation. Especially in homicide cases (Arist. *Rhet.* 1354a22−3) and in private suits (*Ath. Pol*. 67.1) a formalisation of this 'rule of relevance' (which evidently required a statement under oath)[134] forced litigants to pay even closer attention. However, the question of what is relevant can be a subjective one (even in contemporary times) but, as will be demonstrated in due course, there were some patterns of argumentation that the Athenians followed. These referred to *what* was regarded as positive or reprehensible conduct and *how* and *when* it should be argued. These patterns demonstrate that the Athenians had, in the main, a fixed idea of the kind

of argumentation which should be admissible in a courtroom. Furthermore, the same ever recurring patterns show that the steps taken by the Athenians in their effort to objectify the subjective approaches to relevance, although they had not produced formalised rules and controlling mechanisms, were largely adequate to limit litigants' complaints to a minimum. Thus, a consistency of argumentation may be found in Athenian courts, especially as to how and what should count as relevant character evidence. The fact that an Athenian litigant or a limited number of jurors (in the absence of formal rules of admissibility and enforcement procedures) may have followed their own, subjective ideas, is not enough to demolish a more coherent picture of the Athenian approach to relevance. The majority had steady ideas of relevant argumentation and the reason for this is to be found in the ethical coherence of the Athenian polis and the underlying unifying assumptions about character and personality they shared.

Johnstone[135] and Rubinstein[136] have shown that defendants were more prone to digressions towards irrelevant statements, usually being the receivers (positively or negatively) of ad hominem argumentation. Defendants cited their public services and liturgies quite a lot more often than the prosecutors in order both to erode the authority of the prosecutor's story and to construct a relationship with the jurors that could afford them the latter's goodwill. Furthermore, defendants asked for *charis* and pity, so they had to provide good reasons for such appeals to have any effect. Johnstone explains these tendencies of the defendants by reference to the asymmetric roles they had in relation to the prosecutors. The different, harsher for the defendant, consequences of an adverse verdict triggered appeals to more general considerations, countering the prosecutors' attempt to contain the disputed story to a legal case based solely on the written statute. According to the same author, the defendant's character was on trial as the prosecutor's was not.[137] In general terms it is true that a defendant had more incentives to provide character evidence in order to support his case. Although his character was not on trial, nonetheless the proceedings were *in personam*, so (in the special context of an Athenian trial discussed above) he had to persuade the jurors by reference to arguments from probability that he is not the person to have committed the illegal act. The defendant's character had probative value as to his guilt, in the sense that most factual disputes called for wider invocation of character evidence in order to prove the likelihood of an alleged act. Besides, in adversarial trials which consist predominantly of oral evidence and where litigants act as the main source of information, parties attempt to prove their credibility and trustworthiness, to present a convincing story and, in turn, receive the goodwill of the audience.

Apart from the defendants, these considerations affected the strategy and tactics of the prosecutors as well, mainly as pre-emptive references in order to anticipate and neutralise such argumentation by their opponents. Lysias recognises that it

> has become the custom in this city whereby defendants make no defence against the charges, but sometimes deceive you with irrelevant statements about themselves, showing you that they are fine soldiers, or have captured

> many enemy ships while serving as trierarchs, or have made hostile cities into friendly ones (Lys. 12.38).

Aeschines in *Against Timarchus* argues that

> in courts the defendants use counteraccusations against their accusers to escape their prosecution by turning the jurors' focus on irrelevant matters (Aeschin. 1.179−80).

However, the prosecutor in a speech during a *dokimasia* (Lysias 26), where the defendants argued that it was valid to offer a more general account of their life, takes a neutral approach, de facto accepting the validity of such a defence. Before proceeding to counter the defendant's evidence concerning his character, he observes that

> today he will make but a brief reply to the charges brought against him, skimming over the facts and shuffling off the accusation with his defence; and he will tell how he and his family have spent a great amount on the State, have performed public services with ardent zeal, and have won many brilliant victories under the democracy; that he himself is an orderly person, and is not seen acting as others of our people venture to act, but prefers to mind his own business. I do not think it difficult to refute such statements (Lys. 26.3−4).

Either way, Athenian litigants endeavoured to justify the introduction of ad hominem argumentation and put the blame on the opponent for initiating such a challenge. Retaining the adversarial character of the trial, parties presented their controversial, potentially prejudicial statements as aides to the quest for truth or, at least, as comments authorised by resort to fairness. To be sure, this is not unfamiliar in modern courtrooms. The approach of modern English common and statute law is similar, in its effort to control and put some checks and limits on the adversarial parts of the trial. According to that approach, a litigant should not gain an advantage by introducing prejudicial evidence; fairness requires that the opponent must have the opportunity to refute such claims.[138] Section 101 of the CJA 2003 states among others:

> In criminal proceedings evidence of the defendant's bad character is admissible if . . . (f) it is evidence to correct a false impression given by the defendant and (g) the defendant has made an attack on another person's character.

Thus, apart from its probative value or relevance, evidence ought to be admitted due to considerations of fairness; this was recognised by the Athenians as well.

The issue of fairness was deemed central for another reason; both parties ought to have equal treatment before the laws and the court. Demosthenes warns the jurors not to accept any irrelevant pleas by Aeschines since not only he (Demosthenes) is not the man on trial (implying that this would be a valid excuse?), but

also he wouldn't be given any more time after the defence speech to give his own account on the matter.[139] Defendants ought not to gain an unfair advantage by offering a false impression that couldn't be corrected afterwards. On a prosecution speech against Nicomachus the *anagrapheus*, the prosecutor states:

> I should have made no reference to these events had I not learnt that he was going to attempt, by posing as a democrat, to save himself in despite of justice, and that he would produce his exile as a proof of his attachment to the people . . . so that he cannot expect to get any credit on that account (Lys. 30.15).

Since prosecutors anticipated such statements, they pre-emptively tried to gain themselves an advantage (or avoid a disadvantage), creating bias and curtailing the defendants' freedom for tactical manoeuvring. A usual method for achieving this was the insistence on relevance rules and the Heliastic oath, which provided that speeches and verdicts should be given in accordance with the law. In addition, the defendants' wide use of irrelevant extra-legal argumentation was attacked as revealing their weakness in not finding more precise and relevant argumentation. Lysias says that the defendant 'failing to find a plea for his own defence, he will try to slander me'.[140] Demosthenes wonders whether irrelevant argumentation doesn't mean simply that he's at a loss for good arguments:

> Who would choose to make accusations when he's on trial, if he had a defence he could make?[141]

Defendants, on the other hand, sought to place the responsibility for irrelevant argumentation (especially concerning character) on the prosecutor. Following a rationale similar to that of the Criminal Justice Act 2003, it was widely accepted that in the course of a litigant's attack on another's character, fairness demanded a chance for response. Nevertheless, the blame should be placed on the initiator. As early as Antiphon there are examples (from homicide cases) of such argumentation. In Antiphon 5 (*On the Murder of Herodes*), the defendant finds it terrible that the prosecutor compelled him to defend himself on such, irrelevant, issues.[142] Lysias offers a similar argument on a non-homicide case. The defendant (Lys. 9) argues that since 'my opponents are defaming me I am forced to make my defence on the basis of all these topics'.[143] Demosthenes argues repeatedly that the digression from normality in offering character evidence, both in defence of himself and against Aeschines' character, is due to the prosecutor's provocation. It is important to note that Demosthenes reminds the jurors about this on almost every single occasion. From the very start of his speech he offers his view of the matter:

> Now if Aeschines had confined his attack to the charges in his indictment, I in turn should now be giving my defence of the decree. But since he has

> wasted just as many words in detailing other matters and lied about me in most of them, I think it necessary, and at the same time fair (δίκαιον), to speak briefly on these matters first, so that none of you may be led by irrelevant arguments into listening less sympathetically to my pleas against the indictment (Dem. 18.9).

This point is repeated several times. In 34–5 he says:

> I demand and beg of you, men of Athens, to remember this throughout the whole trial, that if Aeschines had not made charges that were extraneous to the indictment, I should not be speaking on any irrelevant matters.

In 50 he says that

> it is Aeschines' fault for having bespattered me, so to speak, with the dregs of his own wickedness and his misdeeds, of which I had to clear myself for the benefit of those who were born after the events'. More significantly, in 124 he states that 'Aeschines chose to rail against me rather than accuse me. Well, in that exercise he should not get away with less than he gave.[144]

It becomes obvious then that in the case of broad extra-legal argumentation which, in the absence of formalised rules, could be considered at the margins of relevance, both defendants and prosecutors felt (not only legally, but also ethically and rhetorically) obliged to excuse themselves and put the blame on the opponent. This course of argumentation also determined the behaviour of supporting speakers, even to the presentation of evidence about the deceased. In a trial concerning an estate, the son of the deceased says:

> About my father – since the prosecution speeches have treated him as a criminal – please forgive me if I report what he has spent on the city and his friends (Lys. 19.56).

The issue of relevance also arose when litigants referred to third persons. In the most famous speech of Lysias, against Eratosthenes, the former member of the Thirty, he says:

> Let nobody claim that I am making irrelevant charges against Theramenes, when it is Eratosthenes who is on trial, because I hear that he will defend himself by claiming he was an ally of Theramenes and shared the same activities (Lys. 12.62).

Athenian litigants, notwithstanding the wide (compared to modern courts) discretion they enjoyed, consciously or subconsciously felt the need to offer the above excuses. The evidence at our disposal demonstrates that this was a successful method of tranquilising a hostile audience, taming *dikastic thorubos*

(uproar), and finally sending the arrows against the opponents. Considering the above, the main point remains, namely that the issue of relevance was substantial and existent in Athenian courts. Litigants remained alert that deviation towards irrelevant argumentation was capable of damaging their credibility and trustworthiness and therefore their chances of success. Within an overwhelmingly agonistic and demanding environment, litigants ought to present their case in a way that took into account public opinion in addition to their opponents' argumentation.

Nevertheless, Athenian litigants, despite their condemnation of irrelevant statements, felt obliged to offer a more general account of their case, presumably believing that this was appropriate, legitimate and illuminative of the particular case. There was trivial opposition to the relevance of such evidence (which was clearly significant in arguing a case and had an impact on the decision-making process) and there is nothing inconsistent in their approach. The defendant in Lysias 21 states:

> In regard to the counts of the accusation, gentlemen of the jury, you have been sufficiently informed; but I must ask your attention also for what has yet to be added, so that you may understand what kind of person I am before you give your verdict upon me (Lys. 21.1).

In the ninth fragment of Lysias' speeches the litigant says that

> it is not because of the crimes of my opponents (prosecutors) that I expect to win this case, but instead because of my own good character (Lys. Fr. 9 [60]).

Thus, although the issue of relevance was central, and most of the times at the cutting edge of the antagonism between litigants in their effort to gain the goodwill of the jurors, it was also acknowledged that character evidence could shift the balance (especially in public cases) and turn the verdict in favour of one party or another.

Conclusion

The discussion above, which is indicative and not exhaustive, demonstrated that the Athenian legal system was designed in such a way as to create incentives for evaluating, controlling and directing the more general behaviour of Attica's inhabitants and Athenian citizens in particular. The structural encouragement for broader invocation of extra-legal argumentation was a useful tool in assisting this aim. Nevertheless, in order to acknowledge law as 'the enterprise of subjecting human conduct to the governance of rules',[145] the court system and its decisions must have a certain degree of consistency and predictability.

Lanni argues that the formal Athenian court system played a vital role in maintaining order by enforcing informal norms. In her opinion, 'the enforcement of extra-legal norms also permitted the Athenians to enforce a variety of social

norms while maintaining the fictions of voluntary devotion to military and public service and of limited state interference in private conduct'.[146] Nevertheless, in order to be able to adjust one's behaviour to such extra-legal norms, one must be *certain* as to *which* are the norms (which according to Lanni are informal and unwritten), *what* they provide (in order to conform to them), and *when* they are enforced. A simple threat of spontaneous, sporadic and discontinuous punishment for a breach of unidentified norms could only lead to the obsolescence of the court system as a whole. Lanni characterises the Athenian court as 'highly unpredictable and prey to distracting stories'. My question is how such a system of unpredictability, inconsistency and incoherence, could provide a serious incentive for the adjustment of everyday social behaviour to generally acceptable and coherent norms. In my opinion, only a *consistent* approach as to the reasons for punishment can provide a considerable deterrent and Lanni's suggestion does not offer it. Furthermore, punishment has to be counter-balanced by an offer of rewards, especially in a shame/honour-culture, in order to provide an incentive for the average citizen to willingly conform to communal standards of behaviour. Such a balance could strengthen the role of courts as determinants of acceptable social norms.

In particular, as far as Athens is concerned, deeper factors underlie both the adherence of individuals to ethical norms and the belief in the relevance of their presentation (or advertisement) in courts. These have to be traced in the psychology of the ancient Greeks which can be revealed by re-examining and questioning modern presuppositions and applying a more suitable model of interpretation of the litigants' speeches. In the next chapters, it will be shown that the Athenian ideas of 'character' and 'personality' influenced and dictated their approach to justice and their argumentation in courts. The courts were designed to work in harmony with these ideas and this is proved by their internal processes. The belief in the stability and indivisibility of a man's character could aggrandise a single past act's importance in proving credibility or propensity.

By the same token, the courts' methods had significant effects on the life of the polis. Their centrality in the Athenian life, and the frequency of the ordinary man's occupation with them, gave them significant influence on the average citizen's life. Private and public behaviour were continuously checked, re-examined, and authorised providing yet another incentive to conform to the polis' social and legal norms. Again, according to Gill's 'objective-participant' model of the self, a person's ethical beliefs are influenced and informed by his environment. Adherence to these beliefs and successful performance of one's role in the community constituted the individual's path to virtue. Thus, showing an understanding of the social norms and demonstrating a real or pretended conformity with them were the guaranteed ways of achieving good reputation and social standing. Finally, the patterns and conventions endorsed by the courts and followed by Athenian litigants facilitated this process. Allowing for consistency of verdicts and avoiding ad hoc judgments, Athenian courts were able to direct and educate the citizens as to the meaning and the content of the acceptable ethical and social norms.

Notes

1 Arist. *Pol*. 1274a1ff.
2 Cf. the objective / participant Greek model of the self and its relevance to ethical motivation, explained in Chapter 5.2.
3 Hansen (1991), p. 180.
4 Hansen (1991), p. 308.
5 Lacey (2001), p. 250.
6 Lacey (2001), p. 268; cf. pp. 269−72.
7 Humphreys (1985); Todd (1990).
8 However, Carey (2011), p. 16 rightly observes: 'There is no reason to doubt that witnesses do offer moral support and that the identity, status and public record of a witness are set to the credit of the litigant. But it would be a mistake to suppose that the factual message is of no interest. Witnesses are *always* called to attest a fact, never merely to state their support; and there are penalties for (proven) false testimony. And there is no real reason to believe that Athenians were more prone to give false evidence than moderns.'
9 Arist. *Ath. Pol.* 67.1; Dem. 57.59, Lys. 9.1; cf. Lys. 3.46, Antiph. 5.11, 6.9.; Rhodes (2004) argues that forensic speeches focus mostly on the charge in question.
10 Nonetheless, as will be shown in subsequent chapters (and as was mentioned in the Introduction), there were adequate methods of deciding whether and why an argument was 'to the point' and what should be received as 'relevant'.
11 Todd (1993), p. 138.
12 Bers (1985).
13 For reference to *thorubos* in symbouleutic contexts, see Dem. 19.23, 113; 18.143; 19.15, 45, 122; Aeschin. 1.34, 80; 2.84, 153; 3.82, 224; Andoc. 2.15; Lys. 12.73.
14 Bers (1985), p. 3, Plut. *Life of Aristides*, 4.1.
15 See Is. 5.20; Dem. 18.10; 44.79; 47.44; 50.3; Din. 1.41−3.
16 See Hyp. 1.11; Dem. 19.75, 162; 18.2, 160; 21.28, 40; Is. 6.62.
17 E.g. Dem. 45.6; 57.63-65; cf. Hyp. 4.31.
18 Cooper, the translator and editor of this speech for the University of Texas Press Series of Attic Orators, comments on this passage (Worthington et al. (2001), p. 71, n. 5): 'Speakers often ask their audience not to interrupt. It is hard to know whether in any given speech this is a real concern or a rhetorical play, but it is likely that such interruptions were not uncommon and the Athenian courtroom could at times be a noisy place, with jurors interjecting their own thoughts and comments.'
19 For the absence of jurors' deliberation between themselves prior to the vote, see Arist. *Pol*. 2.1268b7−11. For the significance of deliberation in modern courtrooms and the supposition that jurors may reach their decisions before deliberation, see McEwan (2003), p. 5 and n. 16 with relevant bibliography.
20 'At all times the compulsion of proving a case lies on the plaintiff' [tr. in Sienkewicz et. al. (1999)].
21 See Harrison (1971), pp. 94ff.; Thür (2007); Harris (2013b).
22 Harrison (1971), p. 123. For the *dike emporike* see Lanni (2006), pp. 150ff.
23 By 'legal burden of proof' I mean 'the burden of persuading the tribunal of fact of the truth or sufficient probability of every essential fact in issue' or, in other words, 'to prove the elements of the case or defence to the appropriate standard'; by 'evidential' I mean the requirement 'to adduce sufficient evidence to justify, though not require, a favourable decision'. See Glover and Murphy (2013).
24 See *R (N) v Mental Health Review Board (Northern Region)* [2006] QB 468, esp. at [62]; In *re B (Children) (Care Proceedings: Standard of Proof) CAFCASS Intervening* [2009] 1 AC 11.
25 This formulation has been approved on more than one occasion by the House of Lords, e.g. *Woolmington v DPP* [1935] AC 462, 481; *Mancini v DPP* [1942] AC 1, 11; *Miller v Minister of Pensions* [1947] 2 All ER 372, 373.

26 E.g. *Summers* [1952] 1 All ER 1059.
27 See McEwan (2003), p. 134: 'Most British and American judges think it best to avoid giving a definition of beyond reasonable doubt, leaving it to juror common sense to fix the appropriate level of certainty . . . the absence of a definition clearly affects verdicts as much as the terms of any definition that is provided'.
28 E.g. Lys. 9.1−3.
29 Hyp. 4.32; Dem. 18.9; Aeschin. 1.166−70.
30 Hansen (1991), p. 91.
31 Hansen (1991), p. 182, citing Kroll (1972), pp. 69−90.
32 For 'common sense' in modern jurisprudence, see McEwan (2003), pp. 16−23.
33 Todd (1993), pp. 94−6; Hansen (1991), p. 180; Dem. 46.26.
34 For a comprehensive discussion on supporting speakers see Rubinstein (2000). Up to that work, modern scholarship preserved one of two functions for the *synegoros*: either as 'a "super-witness" whose role in the legal proceedings amounted to a display of solidarity with the main litigant' (true in private cases) or as the 'Vicarious Voice of the main litigant only if it was universally agreed that the main litigant could not be expected to plead his case adequately because of exceptional circumstances' [Rubinstein (2000), p. 17]. Rubinstein (2000, p. 18) adds one more function, interpreting the role of *synegoros* as 'a "with-speaker" who could join in the proceedings because he had a personal or political interest in the case, and whose role in the trial would not necessarily be perceived as a token of his personal solidarity with the main litigant. Rather, such a speaker might represent himself as involved in the dispute in his own right, but without necessarily having to represent the legal dispute as "his" action'.
35 Lys. 32.2, 9−10; Dem. 18.
36 Todd (1993), p. 95, n. 19 says that only thirteen of the surviving speeches were delivered by *synegoroi*; see also Carey (2011), pp. 13−4. On the other hand, Rubinstein (2000, Chapter 2 and Tables 1 and 2), reserves a more significant role for them and argues that this practice which was 'hitherto considered exceptional was in fact the norm in certain types of legal action'. She finds 25 speeches delivered by *synegoroi* and six delivered by elected prosecutors.
37 See Lavency (1964); Dover (1968); Usher (1976).
38 Carey (2011), p. 19.
39 Griffith-Williams (2013), pp. 24−5.
40 See Frank (1949), Ch. 6. The 'fight theory' he develops, which is another way of naming the adversarial mode of conducting trials in realistic terms, poses significant problems for the appropriate, though idealistic, utmost aim of the court as an institution for finding the 'truth'. In practice, lawyers abstain from being facilitators of the court system's implementation of justice in this respect, and winning a case becomes much more important than ascertaining the true facts. Cf. Kubicek T.L. (2006).
41 Arist. *Rhet*. (1372b–1373a) mentions different types of probable victims. Within this category fall those that are either of bad repute or whose character and life do not support their case: 'And those who have been slandered, or are easy to slander; for such men neither care to go to law, for fear of the judges, nor, if they do, can they convince them; to this class belong those who are exposed to hatred or envy.'
42 The fact that investigation was a problematic field of Athenian law is proved by Antiph. 5.67−71 where he refers to past crimes that have been unsolved or, even worse, to men who were condemned due to undue hurriedness, with their innocence being proved through time.
43 Carey (2011), p. 19.
44 Gagarin M. (1994); Harris E.M. (1994).
45 See Carey (2011), p. 19: 'If they wished to show leniency to a defendant they believed to be guilty, or to withhold success from a prosecutor whose motives or behaviour they considered suspect, they could only register this desire by voting for acquittal or conviction, or (in 'assessed' cases only) by choosing the more lenient of the penalties proposed.

It was therefore necessary not only to project a character which invited trust but also to present oneself as deserving the judges' goodwill in order to ensure that any inclination on the part of the judges to be swayed by factors outside the issue counted in one's favour.'

46 E.g. Dem. 22.25−7; for discussion of the rationale see Carey (2004), esp. p. 131; also see Osborne (1985), Todd (1993).
47 Carey (2004) accepts this as a part of the rationale, though protesting against 'neat explanations' which lead to oversimplification.
48 Gill (1996); a thorough discussion will follow in Chapter 5.
49 This might explain some weird maxims such as 'justice is doing what pertains to oneself' which was apparently appealing to Plato, and that 'the virtue of a woman is to be least talked by men either for good or for bad', assigned to Pericles in his Funeral Oration.
50 The main adjustment being that this model was one-way; namely the prosecutor could opt out for a lesser and less risky offence but not vice-versa, except where the criteria for the more severe action were met. [Carey (2004) p. 130].
51 Osborne (1985), p. 43.
52 E.g. Dem. 27.2; 29.1; 44.1; 53.13; 58.3; Antiph. 1.1; 5.1, 5, 79.
53 See Hansen (1976).
54 See for e.g. Lys. 7.21.
55 Lys. 14.44–5.
56 Carey (2011), p. 19.
57 Cf. Griffith-Williams (2012), p. 155: 'In the absence of an authoritative decision from an objective adjudicator, each of the dicasts had to make up his own mind about the relevance and cogency of all the evidence which the litigants in a particular case had chosen to adduce. Of course, we have no means of knowing the thought processes by which the dicasts reached their decisions. It seems likely that at least some of them, in any given case, might have been susceptible to means of persuasion that were not strictly rational or legal.'
58 See Harris (2006).
59 Cf. Carey (2004), esp. p. 132.
60 Lyc. 1.12; Aeschin. 1.92.
61 See Chapter 4.
62 I borrow the term from Todd (1993), who uses this term in order to denote the procedures not belonging either to the category of *graphai* or of *dikai*.
63 Hansen (1991), p. 220.
64 Hansen (1991), p. 222.
65 Although this might not have been universally observed. See Lys. Fr. 7 [175] ff: 'Since his return [from exile], he has never offended any of the Athenians, either by mentioning his own benefactions or by drawing attention to other people's offences. But now something must be said about him, because he is defending this *dike* against the sort of man who under the Four Hundred went into exile, made Decelea his base, and joined the enemy in attacking his fatherland.'
66 Dem. 18.210; cf. Ruschenbusch (1968), pp. 47−53; Dem. 21.25−8, 32, 44−5. This statement is largely accurate, at least as an anticipation of the defendants' effort to widen the focus of the legal case and induce the jurors to take into account extra-legal considerations. This differentiation between private and public cases is supported by statistics; for example, prosecutors mention the jurors' oath more in public than in private cases, in their effort to limit the defendants' opportunities for manoeuvring [see Johnstone (1999), p. 37]. On the other hand, defendants refer to their services to the city and ask for *charis* more in public cases than in private ones [Johnstone (1999), p. 128]. However, prosecutors themselves prompted (to some extent) this response from the defendants in public cases since they presented the whole polis and the jurors as the victims of the defendants' alleged crime [Johnstone (1999), p. 52: 'public prosecutors spoke, for example, of the "polis" more than three times as often as speakers in other

kinds of cases']. Moreover, Rubinstein (2000, p. 22) uses the model of team-based prosecution in public cases in order to draw attention 'to the fact that there seem to have been important differences between public and private actions in regard to the way in which the pleading was conducted in the courtroom'.

67 Plat. *Laws* 767B.
68 Lys. 30.9.
69 Hansen (1991), p. 315.
70 Hyp. 3.32−8.
71 Plut. *Mor*. 843D. Harris (2006) on the other hand cites other instances when it is convincingly proved that Athenian courts did not decide under such extra-legal influences.
72 The fact that an appeal to pity presupposed a litigant's innocence is proved by Konstan (2000).
73 For the implications of this classification see Todd (1993), p. 112ff.
74 See Headlam (1933), pp. 96−102; Hignett (1952) pp. 205 and 232; Harrison (1971), p. 201; MacDowell (1978), p. 168.
75 Adeleye (1983), p. 296; for this trend see Bonner (1933), pp. 12−13 and 40; Jones (1957), p. 48; Hansen (1991), p. 219.
76 Arist. *Ath. Pol*. 45.2 and 55.2−4; Lys. 16; 25; 26; 31; Aeschin. 3.14ff. says that the law specifically provided for the scrutiny of anyone who was to be in charge of any state business for more than thirty days and anyone who was to preside over a court.
77 See Lipsius (1905−15), pp. 270−8; Kahrstedt (1936), pp. 59−63; Harrison (1971), pp. 201−3; Rhodes, *Boule* (1972), pp. 176−8.
78 Arist. *Ath. Pol*. 45.2 and 55.2−4; Lys. 16; 25; 26; 31; MacDowell (1978), pp. 167−9; Harrison (1971), pp. 200−5.
79 Aeschin, 1.186; 1.28ff.
80 Todd (1993), p. 288.
81 Cf. Hansen (1991), p. 219: 'And even if he [the candidate] possessed all the formal qualifications he could always be turned down on the ground that he was unworthy to hold office.'
82 Lys. 24.1.
83 Lys. 16.9; cf. 16.1, 16.3.
84 Without taking into account the military *dokimasiai* for the cavalry etc., the number of allotted public offices amounted to more than seven hundred.
85 This procedure, although under the name of '*dokimasia*', has two important differences from the normal procedure of *dokimasia* discussed above. First, unlike the normal procedure, this scrutiny of orators is retrospective, in the sense that it 'concerns the right to speak in public of a man who in most cases has already exercised that right'. Second, this procedure is initiated by a charge brought by *ho boulomenos* rather than having the automatic application of the normal *dokimasia* procedures. See Todd (1993), p. 116.
86 See Fox (1994), pp. 148−51.
87 Aeschin. 1.2, 32, 64, 81, 186.
88 Todd (1993), p. 120, n. 20.
89 I acknowledge that in a system lacking the formalised concepts of burden and standard of proof it is risky to maintain that a prosecutor had to prove his case in absolute terms rather than in terms relative to the defendant's position. However, in principle, the Athenian courts in a *dike* or a *graphe* ought to deliver their verdicts by reference to the legal charges as specified in the written plaint, *in personam*, for or against the specific person of the defendant. Therefore, this was a point of reference which ought to contain both the jurors' decision making and the litigants' argumentation. In an inheritance case the argumentation referred more to the future of the estate and to the testator's *oikos*, so it may be suggested that the proceedings focused *in rem*. Thus, the court had to assess the relative trustworthiness and background of the claimants in order to decide who would be the best inheritor of the estate and, in sequence, in all probability, whom among the claimants the testator would have chosen as his beneficiary.

90 For an analysis of 'open texture' and its meaning, see Hart (1961, pp. 125ff.). For the 'open texture' in Athenian law see Harris (2000). This definition of 'open texture' does not include Osborne's understanding of this phrase as 'procedural flexibility' [Osborne (1985), pp. 43−4]. Procedural flexibility in Athenian courts is treated in the earlier sections of this chapter.
91 This is one of Fuller's eight rules in order for a failure of the system to be avoided. Fuller (1969).
92 Pl. *Statesman*, 295a; *Ar. Pol.* 1282b2; *Ath. Pol.* 9.2; cf. Dem. 24.68; Aes. 3.199; Lyc. 1.9.
93 The more characteristic example is Lys. 10.
94 Cf. MacDowell (1976), Fisher (1992), Cairns (1993).
95 Carey (2004), p. 118.
96 *Burstein v Times Newspapers Ltd* [2000] EWCA Civ 338; [2001] 1 WLR 579; [2001] EMLR 364.
97 There have been serious attempts to argue that this speech is an unrevised draft [e.g. Dover (1968), pp. 172−4], or that it has never been delivered in court, based on the argumentation made by Aeschines (3.52) and followed by Plutarch (Demosthenes 12). MacDowell (1990), pp. 23−8 examines the traditional view that this speech never came to court and concludes that 'there is no proof, then, that the speech was not delivered'. Rubinstein (2000), pp. 208−9 argues for an alternative interpretation of the accusation made by Aeschines that Demosthenes sold his case, in the sense that the latter agreed to propose a small penalty at the *timesis* phase in return for a sum. Harris (2008), pp. 85−6, argues for the authenticity and actual delivery of this speech in court.
98 Cf. Fredal (2001).
99 Cf. Dem 21. 59, 133, 135−7.
100 We possess thirty-five examples of its use in the period 403−322, a very large number compared to the slim evidence we have. Hansen infers that 'there is nothing against supposing that the jurors must have judged a *graphe paranomon* something like once every month'. A similar procedure, though not so frequently employed, was the *graphe nomon me epitedeion theinai*, concerning permanent laws whose numbers were significantly less than temporary decrees.
101 For the principal study on *graphe paranomon* one should refer to Hansen (1974).
102 Hansen (1991), p. 207.
103 Dem. 18. 123. However, through the centuries he has been accused of not observing in practice his own theoretical remarks, and winning this legal case against Aeschines by resort to irrelevant arguments. Nevertheless, Harris (1995) has proved that in fact Demosthenes offered an elaborate address of Aeschines' legal arguments and, presumably, this was the decisive factor in his total victory.
104 See for example Dem. 18.41, 311ff; Aeschin. 3.151, 155, 159−63, 175−6; Dem. 22.24, 49−54, 78; 25.37, 39−40.
105 Honours and grants of citizenship formed a very large part of all the decrees passed by the Athenian Assembly in the fourth century. Of the thirty-three *graphe paranomon* cases for which we know the content of the indicted decree, twenty-one concern such issues. See Hansen (1991) pp. 157 and 211.
106 E.g. Dem. 55.
107 Carey (2011), p. 100.
108 Todd (1993), p. 271.
109 For this recognised sequence of related offences, in ascending order of seriousness, see Todd (1993), pp. 268−9: 'Ariston, for instance, the plaintiff in Dem. 54, claims that the *dike kakegorias* was intended to stop a quarrel degenerating from verbal abuse (*loidoria*) into violence (*plegai*: lit. 'blows'); the *dike aikeias*, from violence to physical injuries (*traumata*); and the *graphe traumatos ek pronoias*, from injury to killing (*thanatos*), which would itself give rise to a *dike phonou.*'

110 Todd (1993), p. 279; Osborne (1985), pp. 56–8.
111 Mummenthey (1971), p. 89.
112 For Demosthenes 39 and the *dike blabes* see Carey and Reid (1985), p. 166.
113 Harris (2000), p. 58.
114 Griffith-Williams (2012), discusses this point by reference to the speakers' argumentation in Isaeus 7 and Isaeus 9, two cases where the rhetoric of the parties suggests that in all likelihood the presented will cannot express the genuine wishes of the testator.
115 For instances where the law's 'open texture' concerning succession could affect the litigants' argumentation, see Harris (2000), pp. 35–9.
116 Griffith-Williams (2012), p. 152.
117 For a detailed discussion of these issues see Carey (2011), pp. 127–33 who interprets these points as 'an attempt to sway the judges on the ground of the different characters of the two sides, the brothers loyal to Athens, ready always to do their duty to the state, and Chariades, criminal and disloyal to the city' and Griffith-Williams (2012), pp. 160–1 who finds a potential relevance to the legal case, as far as the attack on Chariades is concerned.
118 It also constitutes a good example for 'open texture' since the term 'rhetor' could have a broad and a narrow meaning. Hansen (1983), pp. 39–40.
119 Aeschin. 1.28–32.
120 This technique, aiming at the establishment of a special relationship of concord and unanimity between the speaker and the audience, is evident from Homer onwards. Although it is not evident solely on forensic settings (cf. Ar. *Wasps*; McGlew (2004)), it is in the Attic orators that it achieved its perfection.
121 On the procedure of *timesis* an indicative bibliographical list would include MacDowell (1978), pp. 253–4; Harrison (1971), p. 80, who offers a classification of the offences; Todd (1993), p. 134.
122 Harrison (1971), p. 81 referring to Dem. 37.40.
123 Todd (1993), p. 134.
124 Scafuro (1997), pp. 393–4.
125 Lanni (2006), p. 119.
126 Cf. the approach taken by the US Supreme Court in the case of *Gregg v Georgia* 428 U.S. 153 (1976). In this case the Supreme Court discussed the constitutionality of the death penalty in relation to the Eighth Amendment to the US constitution. There, the court decided that the death penalty was not unconstitutional per se, provided that its imposition was not arbitrary. In order to overcome this danger, the Supreme Court required certain safeguards on the part of the states, one of which was to provide for a bifurcated trial consisting of the 'guilt-innocence phase' followed by the 'punishment phase'. During the first phase, the guilt or innocence of the defendant is to be decided on an objective basis by reference to the definition of the 'capital crime'. During the second phase, any mitigating circumstances, the criminal record and the character of the condemned defendant could be taken into account to decide whether the particular person deserves the capital punishment.
127 Todd (1993), p. 134.
128 Harris (2006), p. 177.
129 Harris (2006), p. 177.
130 Harris (2006), p. 175.
131 For private *dikai*, see Arist. *Ath. Pol*. 69.1; for homicide trials see Arist. *Rhet*. 1354a22–3.
132 Harris (2013b).
133 Aeschin. 1.166.
134 Gagarin (2012), p. 295, n. 5; Rhodes (2004).
135 Johnstone (1999), p. 94.
136 Rubinstein (2000), p. 195.

137 Johnstone (1999), p. 97. However, the author admits (pp. 98ff.) that this assumption is subject to many reservations.
138 See Criminal Evidence Act 1898 s. 1(3); Criminal Justice Act 2003 s. 101 (1) (e), (f) and (g).
139 Dem. 19.213.
140 Lys. 30.7.
141 Dem. 19.213.
142 Antiph. 5.75; see also 6.8.
143 Lys. 9.3.
144 Dem. 18.124; see also 18.126: 'I was forced to reply due to the slanders uttered by my opponent'; cf. 18.256.
145 Fuller (1969), p. 96.
146 Lanni (2009).

References

ADELEYE G. (1983), 'The Purpose of the Dokimasia', *Greek, Roman and Byzantine Studies*, 24:4 (1983: Winter), 296.

BERS V. (1985) 'Dikastic Thorubos', in *Crux: Essays in Greek History Presented to G. E. M. de Ste. Croix*, ed. Paul A. Cartledge and F.D. Harvey, London.

BONNER R.J. (1933), *Aspects of Athenian Democracy*, Berkeley: University of California Press (Cambridge: Cambridge University Press).

CAIRNS D.L. (1993), *Aidōs: the Psychology and Ethics of Honour and Shame in Ancient Greek Literature*, Oxford: Clarendon.

CAREY C. (2004), 'Offence and Procedure in Athenian Law', in E.M. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, Duckworth: London, 111−36.

——— (2011), *Trials from Classical Athens* (Routledge Sourcebooks for the Ancient World), London: Routledge.

CAREY C. and REID R.A. (1985), *Demosthenes*: *Selected Private Speeches*, Cambridge: Cambridge University Press.

DOVER K.J. (1968), *Lysias and the Corpus Lysiacum*, Berkeley: University of California Press.

FISHER N.R.E. (1992), *Hybris: a Study in the Values of Honour and Shame in Ancient Greece*, Warminster: Aris & Phillips.

FOX R.L. (1994), 'Aeschines and Athenian Democracy', in R. Osborne and S. Hornblower (eds), *Ritual, Finance and Politics*, Oxford: Clarendon Press.

FRANK J. (1949), *Courts on Trial: Myth and Reality in American Justice*, Princeton, N.J.: Princeton University Press.

FREDAL J. (2001), 'The Language of Delivery and the Presentation of Character: Rhetorical Action in Demosthenes' *Against Meidias*', *Rhetoric Review*, Vol. 20, Nos. 3/4, 2001, 251−67.

FULLER L.L. (1969), *The Morality of Law*, New Haven: Yale University Press.

GAGARIN M. (1994), 'Probability and Persuasion: Plato and Early Greek Rhetoric', in Ian Worthington (ed.), *Persuasion: Greek Rhetoric in Action*, London: Routledge, 46−68.

——— (2012), 'Law, Politics, and the Question of Relevance in the Case On the Crown', *Classical Antiquity*, Vol. 31, Issue 2, 293−314.

GILL C. (1996), *Personality in Greek Epic, Tragedy, and Philosophy: the Self in Dialogue*, Oxford: Clarendon Press.

GLOVER R. and MURPHY P. (2013), *Murphy on Evidence*, Oxford: Oxford University Press.

GRIFFITH-WILLIAMS B. (2012), '*Oikos*, Family Feuds and Funerals: Argumentation and Evidence in Athenian Inheritance Disputes', *Classical Quarterly* 62.1, 145–62.
———(2013), *A Commentary on Selected Speeches of Isaios* (Mnemosyne Supplements), Leiden; Boston: Brill.
HANSEN M.H. (1974), *The Sovereignty of the People's Court in Athens in Fourth Century B.C. and The Public Action against Unconstitutional Proposals*, Odense: Odense University Press.
——— (1976), *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi, and Pheugontes: A Study in the Athenian Administration of Justice in the Fourth Century B.C.*, Odense; Odense University Press.
——— (1983), 'The Athenian Politicians, 403−322', *GRBS* 24 (1983), 33−55.
——— (1991), *The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology*, Oxford, Blackwell.
HARRIS E.M. (1994), 'Law and Oratory', in Ian Worthington (ed.), *Persuasion: Greek Rhetoric in Action*, London, Routledge, 130−50.
——— (1995), *Aeschines and Athenian Politics*, New York; Oxford: Oxford University Press.
——— (2000), 'Open Texture in Athenian Law', *Dike*, 3, 27−79.
——— (2006), 'The Rule of Law in Athenian Democracy. Reflections on the Judicial Oath', *Dike*, 9, 157–81 (= Etica e politica 9 [2007], 55–74).
——— (2008), *Demosthenes, Speeches 20–22*, Austin, TX: University of Texas Press.
——— (2013), 'The Plaint in Athenian Law and Legal Procedure', in Michele Faraguna (ed.), *Archives and Archival Documents in Ancient Societies: Legal Documents in Ancient Societies IV, Trieste 30 September–1 October 2011*, Trieste, EUT Edizioni Università di Trieste, 2013, 143−62.
HARRISON A.R.W. (1968−72), *The Law in Athens* (2 Vols), Oxford: Clarendon Press.
HART H.L.A. (1961), *The Concept of Law*, Oxford: Oxford University Press.
HEADLAM J.W. (1933), *Election by Lot at Athens*, Cambridge: Cambridge University Press.
HIGNETT C. (1952), *A History of the Athenian Constitution to the End of the Fifth Century B.C.*, Oxford: Clarendon.
HUMPHREYS S. (1985), 'Social relations on stage: witnesses in classical Athens', in S.C. Humphreys (ed.), *The Discourse of Law*; *History and Anthropology* 1.2. London: Routledge.
JOHNSTONE S. (1999), *Disputes and Democracy: the Consequences of Litigation in Ancient Athens*, Austin, TX: University of Texas Press.
JONES A.H.M. (1957), *Athenian Democracy*, Oxford: Blackwell.
KAHRSTEDT U. (1936), *Untersuchungen zur Magistratur in Athen*, Stuttgart: Kohlhammer.
KONSTAN D. (2000), 'Pity and the Law in Greek Theory and Practice', *Dike*, 3, 125−45.
KROLL J.H. (1972), *Athenian Bronze Allotment Plates*. (Loeb Classical Monographs.) Cambridge, MA: Harvard University Press (London: Oxford University Press).
KUBICEK T.L. (2006), *Adversarial Justice: America's Court System on Trial*, New York: Algora Publishing.
LACEY N. (2001), 'Responsibility and Modernity in Criminal Law', *The Journal of Political Philosophy* Vol. 9, Number 3, 2001, 249−76.
LANNI A. (2006), *Law and Justice in the Courts of Classical Athens*, Cambridge: Cambridge University Press.

——— (2009), 'Social Norms in the Courts of Ancient Athens', 9. *Journal of Legal Analysis* 691.

LAVENCY M. (1964), *Aspects de la Logographie Judiciaire Attique*, Louvain: Presses universitaires de Louvain.

LIPSIUS J. (1905−15), *Das attische Recht und Rechtsverfahren*, Leipzig: O.R. Reisland.

MACDOWELL D.M. (1976), 'Hybris in Athens', *Greece and Rome* 23 (1976), 14−31.

——— (1978), *The Law in Classical Athens*, London: Thames and Hudson.

——— (1990), *Demosthenes*: *Against Meidias (Oration 21)*, Oxford: Clarendon Press.

McEWAN J. (2003), *The Verdict of the Court: Passing Judgment in Law and Psychology*, Oxford: Hart Publishing.

McGLEW J.F. (2004), ' "Speak on my Behalf": Persuasion and Purification in Aristophanes' Wasps', *Arethusa*. 37, 11−36.

MUMMENTHEY H. (1971), *Zur Geschichte des Begriffes* Blabe *im attischen Recht*. Freiburg: n.k.

OSBORNE R. (1985), 'Law in Action in Classical Athens', *Journal of Hellenic Studies* 105, 40−58.

RHODES P.J. (1972), *The Athenian Boule*, Oxford: Clarendon Press.

——— (2004), 'Keeping to the Point', in E.M. Harris and L. Rubinstein (eds.), *The Law and the Courts in Ancient Greece*, 137−58, London: Duckworth.

RUBINSTEIN L. (2000), *Litigation and Co-operation: The Use of Supporting Speakers in the Courts of Classical Athens*, Stuttgart: F. Steiner Verlag. Historia Einzelschriften; vol. 147.

RUSCHENBUSCH E. (1968), *Untersuchungen zur Geschichte des athenischen Strafrechts*, Köln: Graz, Böhlau.

SCAFURO A.C. (1997), *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy*, Cambridge: Cambridge University Press.

SIENKEWICZ T.J., McDONOUGH J.T., ADELEYE G. and ACQUAH-DADZI K. (1999), *World Dictionary of Foreign Expressions: A Resource for Readers and Writers*, Wauconda, IL: Bolchazy-Carducci Publishers, U.S.

THÜR G. (2007), 'Das Prinzip der Fairness im attischen Prozess', in E. Cantarella (ed.), *Symposion 2005: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Wien: Verlag der Oesterreichen Akademie der Wissenschaft, 131−50.

TODD S.C. (1990), 'The Purpose of Evidence in Athenian Courts', in P. Cartledge, P. Millett and S. Todd (eds.), *Nomos: Essays in Athenian Law, Politics and Society*, Cambridge: Cambridge University Press, 19−39.

——— (1993), *The Shape of Athenian Law*, Oxford: Clarendon Press.

USHER S. (1976), 'Lysias and his Clients', *GRBS*, XVII (1976), 31−40.

WORTHINGTON I., COOPER C. and HARRIS E.M. (2001), *Dinarchus, Hyperides, and Lycurgus*, Austin, TX: University of Texas Press, 71.

3 Greek ideas of 'character'

This chapter examines and analyses Greek ideas of 'character' (*ethos*). In the light of these, some of the original causes of the wide use of character evidence in Athenian courts will be discovered. Current research consists of periodic treatments and lacks a complete and in-depth account of this issue. Examination of Greek conceptions and assumptions regarding 'character' are sporadic and usually of limited focus. *Ethos* thus is typically discussed in relation to other issues, such as the concept of 'will' or the depiction of 'character' in literature. This fact impedes the current study which, although it concerns character evidence in the courts of classical Athens, nevertheless has to rely on a more general analysis of Greek approaches to 'character'.

The main research questions of the current chapter may be summarised as follows. What were the Greek ideas of human character? What did they think about its 'indivisibility'? In other words, does the whole character illuminate a particular trait and vice-versa? Do humans consistently follow identical behavioural patterns regardless of the stimuli? Is a person's general reputation for having a character capable of performing good or bad activities relevant to, for example, a charge of prostitution as in the prosecution of Timarchus? Such are the questions that have to be addressed in order to discover the rationale behind the excessive, by modern standards, reliance of the Athenian courts on character evidence.

The analysis begins with a literature review of modern research on the Greek ideas. Then, modern approaches to 'character' will be discussed in order to highlight the complexity of the theme and the presuppositions that contemporary researchers unavoidably carry when analysing Athenian speeches. Having sketched the context, a close analysis of the Greek ideas of 'character' will follow, as evidenced in the works of the poets, the philosophers and, finally, the orators. The conclusions do indeed expose the rationale behind the wide use of character evidence in Greek rhetoric. Application of these conclusions to the speeches delivered in the Athenian courts will take place in the next chapter.

Modern research on Greek ideas of 'character'

Close inspection of whether the Greeks regarded a human being's character as innate and given from nature (*phusis*) is essential. Its outcome in turn will expose an answer as to its stability and invariability. The groundbreaking Sophistic

movement[1] argued for an intellectual antithesis between nature and nurture, formulated in the question of whether *phusis* or *nomos* played the dominant role in the configuration of a man's *ethos*. This question lies at the heart of the intellectual scene of the late fifth century and left its mark on the great philosophical works of Plato and Aristotle.

Nevertheless, as Dover warns in his book on Greek popular morality

> the extent to which an individual's behaviour is determined by his innate capacity and disposition and the extent to which it is determined by the environmental forces which have operated in him, including example, precept and habituation, constitute a problem to which it is customary to give extremely confident answers founded on little evidence and even less intellectual effort.[2]

This observation is applicable to laymen, classicists and legal historians when examining the original sources. Interpreting 'character' may be highly controversial, so easy solutions and ungrounded judgments need to be avoided. For instance, Dihle assumes that *phusis* is fixed character, while for Fortenbaugh *phusis* can refer to an innate condition which is hard but not impossible to alter. More importantly, *phusis* may also be used to describe what might be called 'second nature', that is an acquired trait that has grown deep roots in the human psyche over time.[3]

Dover's influential remarks are frequently employed by scholars, but the aforementioned tendency to easy solutions (whether due to *phusis* or due to nurture) still exists. Most legal historians remain silent on the issue. Nonetheless, Lanni was daring enough to follow a clear line and base her discussion of the use of character evidence in Athenian courts on the assumption that 'the Athenians tended to view character as stable and unchanging'.[4] She strongly asserts that 'character is normally regarded in classical Greek culture as stable and unchanging, with the implicit assumption that it is a natural attribute over which the defendant has no control'.[5] Although she acknowledges that normally this would create intense questioning as to the moral blameworthiness of such an individual, she leaves unsupported her observation that 'litigants generally do not challenge the idea that one's character should be factored into the jury's calculation of moral desert'.[6]

On the other hand Dover, who seems to be Lanni's basic secondary source,[7] carefully observes that 'in our sources the dramatic situation or the requirements of an argument in court often decide whether a speaker pronounces in favour of nature or of nurture'.[8] Saunders notes that 'occasionally Demosthenes makes an implicit distinction between offenders who are evil by nature and those whose depravity has been acquired'.[9] This fact, namely that the orators were free to use 'character' as best suited their case is a rejection of a firm universal belief in the unchangeable nature of character and a first indication of the complex nature of Greek opinions on the issue.

As it has been noted before, the biased nature of Athenian forensic speeches not only poses problems but also provides answers. In such an agonistic environment

where every single mistake could be manipulated and emphasised by the opponent, no orator would have the suicidal tendency to use such an unpopular argument that would meet the immediate rejection of the audience. Therefore, even a single argument in the speeches that supports the changeability of a man's character should not be attributed to mere opportunism. On the contrary, it may serve to question any firm contention that the Greeks believed in the unchangeable nature of 'character'; examples will be given in due course.

'Character' in modernity

Before proceeding to the discussion of the ideas of character in classical Athens, it is useful to clarify some of the terms and notions that are connected with this theme. In offering a comparative approach to the issue, reliance on modern definitions of, especially, Anglo-American sources, is unavoidable. This approach need not be anachronistic; it is just an agreement on and comparison of terminology and definitions, for the sake of precision and clarity. Later in this chapter an examination of how the Athenians interpreted these same notions will be offered, highlighting the proximity or distance of the two approaches.

The first notion concerning the examination of character evidence is a possible distinction between 'character' proper and 'character' in law. Seemingly, there is no explicit legal definition of what constitutes the character of a person, and the law relies on the common sense use of the term. According to 'The Oxford English Dictionary' *character* means: 'the mental and moral qualities distinctive to an individual; strength and originality in a person's nature; a person's good reputation'.[10] Other, relevant to this study, definitions could include 'The combination of qualities or features that distinguishes one person, group, or thing from another', 'A description of a person's attributes, traits, or abilities', 'Public estimation of someone; reputation', 'Status or role; capacity' etc.

These definitions reveal how broad a meaning the word can acquire in its common usage. On the other hand, partly overcoming this problem, 'character' in law is attributed a narrower interpretation. Usually, it means 'a person's tendency to behave in a particular way'.[11] It is used interchangeably with

> disposition and propensity, which are alternative terms with the same meaning . . . Thus a person might be described as having a violent disposition if he has several convictions for assault or as having an honest character if she has a reputation for integrity.[12]

Nevertheless, as usual in social sciences, terminology is subject to interpretation. Broad and narrow definitions can be offered, not only depending on the social and legal context of a particular period or place, but even on the personal background of a judge.[13] Generally, ancient Athenians preferred a broad definition of 'character', as is proved by their argumentation in the law-courts.

In addition to defining character in a legal context, the concept of 'character evidence' has to be analysed. This phrase in law may be defined as proof or

attestations about an individual's moral standing, his general nature, behavioural traits, and reputation in the general community. Keane in *The Modern Law of Evidence* asserts that character evidence in any event, may constitute evidence of a person's actual disposition, his propensity to act, think, or feel in a given way.[14] It is hardly unobservable that the term is open to contradictory interpretations. If *character* simply means (for example, see Dennis, mentioned above, footnote 158) a person's *tendency* to behave in a particular way, then this tendency can be evidenced by taking into account considerations such as this person's morals and feelings. Also, evidence of past behaviour can be adduced to support an argument about a good or a bad character. Nevertheless, in order to rely on such a '*tendency – approach*', a certain assumption becomes, to a great extent, unavoidable, namely that a person's character is unchangeable and indivisible. The same person will behave in a steady way throughout the years, and his general traits will triumph and be revealed regardless of contexts and situations. Traditionally, the English common law took the straightforward view that a person's character is unitary and indivisible.[15] Thus, if a defendant claimed to have a good character and referred to one particular past example or type of good behaviour, the prosecution could refute the claim by cross-examining him on misconduct in another respect.[16]

Modern psychology has rejected both the simplicity and the universality of this approach.[17] Behaviour is conceived to be a function of both disposition and situation, and their mutual interaction.[18] This does not go quite so far as to destroy the claim that character is 'indivisible'. However, it shows that character evidence should be treated with caution and maybe be limited as to its scope and admissibility in the courtrooms. On the other hand, other scholars suggest that human behaviour is not entirely arbitrary and 'character has both predictive force and probabilistic significance concerning a person's past acts or omissions'.[19] Modern psychological research tends to see behaviour as determined by a combination of personality characteristics and situational factors. This acknowledgement that individuals may act in accordance with established character traits provides useful theoretical support for the claim that past criminal behaviour has probabilistic value for legal fact-finding.[20] Therefore, this still unanswered question of indivisibility and steadiness of character calls for illumination by the Athenian practices.

But where is the justification for the probative value of 'character' to be found? In the past, this was primarily grounded on the intuitive conclusions of laymen as provided by popular assumptions. Such an approach is evident in the aforementioned obsolete picture of the English legal system. The abandonment of character-responsibility and the increasing professionalisation of the legal discourse called for a scientific justification, if 'character' was to be used to predict behaviour. Until the 1960s, research on character was dominated by the '*trait theory*'.[21] This argued that people had relatively stable personality traits which could be utilised to predict future conduct.

This theory, which reserved a highly probative role for 'character evidence', was gravely questioned, giving ground to 'situationism'. This trend sought to explain

behaviour in terms of situational, rather than personal, causal factors. Accordingly, for 'situationism', character evidence has no probative value. During the 1980s, however, it was recognised that this approach too was naïve, and there has now been something of a rapprochement between 'situationism' and 'trait theory', referred to as 'interactionism'. According to the latter, both the combination of and interaction between personal disposition and situations determine behaviour. 'Today, no one contends that people fail to exhibit stable personality characteristics, and no one questions whether social contexts shape affect, cognition and action . . . there simply are no longer any situationists.'[22] Questions nevertheless still remain as to how broadly these stable traits should be interpreted, thus how predictive these dispositional tendencies can prove in divergent situations. Uncertain conclusions characterise even modern times.

Modernity has also brought about a broad movement from ideas of responsibility as founded in character to conceptions of responsibility as founded in capacity. The conception of responsibility founded in capacity is based on notions of human agency which emerged in Europe in the philosophy of the Enlightenment. The idea of the self-determining moral agent, equipped with distinctive cognitive and volitional capacities of understanding and self-control provoked significant consequences for law. This change is evident in the metamorphosis of the English legal system, which shifted from its eighteenth-century character-based responsibility (according to which individuals were held accountable for their general conduct) to a capacity-based responsibility (where individuals are to be held accountable for the specific acts that they choose to do at a given time).[23] Although character-responsibility has left its traces and is deeply embedded in notions such as the 'reasonable person' or 'objective standard of proof', leading to normative judgments concerning an individual's behaviour, 'character' is (theoretically) strictly reserved for specific questions of fact. Otherwise, broader character evidence would violate a 'social commitment to the thesis that each person remains mentally free and autonomous at every point in his life';[24] a conclusion that is inapplicable in ancient times.

'Character' for the Greeks

The beliefs of the poets

The above discussion demonstrates the fallacy of fixed conclusions as to the nature, functions, and eventually, probative value of 'character'. In what follows, the beliefs of the Greeks will be revealed, beginning with the thoughts of the intellectuals. This term encompasses the poets, philosophers and sophists, as separate from the orators. The latter, although offering sophisticated ideas of 'character', tend to manipulate them and provide biased, self-interested views. Therefore, discussion of forensic speeches will be considered separately next.

'Character' for the Greeks is usually referred to as '*ethos*' (*ἦθος*).[25] It is also denoted by '*tropos*' (*τρόπος*) and '*kharakter*' (*χαρακτήρ*). *Ethos* (especially in the singular) best suits this study as it is the word that best captures the disposition of a

human being, particularly focusing on inherent personal traits externalised through general behaviour. Liddell *et al*., following Aristotle (*Nic. Eth.* 2.1.1), see *ἦθος* as the lengthened form (slight variation) of the word *ἔθος* which means habit.[26] For Aristotle, *ἦθος* is the product of *ἔθος (*as revealed by their linguistic proximity), so moral or ethical virtue may be acquired inductively through virtuous habits and deeds. *Tropos* is usually found in the plural (*tropoi*)[27] meaning ways and manners, whereas *kharakter* focuses on the distinctive marks of a person, his 'characteristics'. Neither word, nevertheless, is excluded from denoting 'character' in its current sense, depending on the context. What is of interest here however, is not a philological approach to the issue but rather an enquiry into whether the Greeks believed in an unchanging character which is provided by nature.

Is character provided by nature? Hesiod in the *Works and Days* (l. 67, cf. 78) describes the myth of Pandora. Hermes is charged by Zeus to put in her 'a shameless mind and a deceitful character' (*ἐν δὲ θέμεν κύνεόν τε νόον καὶ ἐπίκλοπον ἦθος*). Character is therefore considered as something given by the gods at the moment of creation. On the other hand, when he uses the word in the plural (*WD* 699: *ἤθεα κεδνὰ διδάξῃς*, cf. *Theog*. 66) it can be translated as 'manners' which, although close to *ethos* and indicative of character (as behavioural traits), are acquirable. For Hesiod then, it seems that *ethos* is inborn and presumably (given his silence on the issue and the fact that is provided by the gods) unchangeable. The use of the word's plural tense refers to manners, ways and customs, a use that remained unaltered through the centuries. Its commonest use refers to general customs of groups or nations and is therefore a distinct notion of the one that is of interest here.[28]

In the singular the word retains its Hesiodic meaning, denoting inborn characteristics, at least until Aeschylus' *Agamemnon* (458 BC). Aeschylus writes:

> Even so a man reared in his house a lion's whelp, robbed of its mother's milk yet still desiring the breast. Gentle it was in the prelude of its life, kindly to children, and a delight to the old. Much did it get, held in arms like a nursling child, with its bright eye turned toward his hand, and fawning under compulsion of its belly's need. But brought to full growth by time, *it showed the nature it had from its parents (χρονισθεὶς δ' ἀπέδειξεν ἦθος τὸ πρὸς τοκέων)* (l. 718−25).

Ethos is inborn in both human beings and animals; sooner or later it overcomes acquired superficial traits and is revealed. This idea of 'character' attributed to *phusis* (nature) remained popular and central to the intellectual discussions of the time. The question of character's heredity puzzled Greek thinkers.[29] Athenian law (either following a psychological or a practical rationale) never got rid of it entirely.[30]

Pindar, writing in the first half of the fifth century, provides an alternative to the above. In the *Eighth Nemean Ode* he writes:

> May I never have such an ethos, father Zeus; may I stick to the simple paths of life, so that when I die I will not fasten a bad name to my children[31] (l. 35).

Pindar uses *ἦθος* as something that can be changed through life. The appeal to Zeus may denote a worry that the Gods can favour or disfavour a man by changing his *ethos*. Yet, the essence remains: *ἦθος* can be altered through the course of life. This conclusion becomes more evident when two other passages from the same poet are compared. In the *Eleventh Olympian Ode* (l. 20) he writes: '*For neither the fiery fox nor loud-roaring lions change their ethos*.'[32] Here, in order to differentiate the use of the word he refers to *ἦθος* as *ἐμφυὲς* (innate, inborn). Inborn '*ethos*' cannot change in contrast to '*ethos*' per se. It is unclear however which attributes he considers as innate and which can be acquired or reformed. To complete the picture and prove that the adjective before the word *ἦθος* was not accidentally used, citation of the *Thirteenth Olympian Ode* (l. 13) is needed. There, Pindar, in order to highlight the second use of the word *ἦθος* as unchanging, accompanies it by the adjective *συγγενὲς* (inborn) (*ἄμαχον δὲ κρύψαι τὸ συγγενὲς ἦθος*). Thus either Pindar recognises two kinds of *ἦθος* (one that may change through the course of one's life and one that contains a person's innate attributes) or he vacillates on the subject and the use of the adjective before the word *ethos* is merely an emphatic tautology. In any case, the absence of a firm supposition is noteworthy and the step towards a belief in the changeability of character has been taken.

Sophocles' *Ajax* and *Antigone*, both relatively early works of the poet,[33] further highlight the changing view of 'character'. In the *Ajax* (l. 595) Sophocles writes: '*You have foolish hope, I think, if you plan so late to begin schooling my ethos*' *(μῶρά μοι δοκεῖς φρονεῖν, εἰ τοὐμὸν ἦθος ἄρτι παιδεύειν νοεῖς)*. The word *ἦθος* is here translated as temper and it denotes the wide spectrum of meanings that it can take. Nevertheless, it certainly refers to the disposition of the hero (more specifically his tenacity), and most importantly to the possibility of its alteration. Ajax does not seem in principle to deny that this can be accomplished. His dissent lies in the fact that it is 'too late'.[34] Sophocles certainly looks aware of the problematic issues linking 'character' and education, issues that were at the centre of attention of the rising Sophistic movement. What is of significance here is primarily the acknowledgement of (or, more conservatively, the reference to) change of character by means of education.

The wide variance of uses of the word *ἦθος*, but also a rising awareness of the possibility of its change and its adjustment to different situations, is provided in the *Antigone* (l. 705–9):

> Do not, then, bear one ethos only in yourself: do not think that your word and no other must be right. For if any man thinks that he alone is wise—that in speech or in mind he has no peer—such a soul, when laid open, is always found empty.[35]

This passage comes close to modern 'interactionism'. *Ethos* here includes the adaptable (and as such acquirable) attributes of a person. It may be differentiated from the inborn characteristics (the idea of their presence is not abandoned) since it can change and be adjusted according to the circumstances. Assessing external

situations and acting in a seemingly incoherent (thus sometimes atypical, impersonal) manner is an acknowledged, possible way of human action.

This view of potentially changeable character is evidently supported by Euripides. In the *Hippolytus* (428 BC) he writes:

> O that in answer to my prayer fate might give me this gift from the gods, a lot of blessedness and a heart untouched by sorrow! No mind unswerving and obdurate would I have nor yet again one false-struck, but changing my pliant ἤθεα ever for the morrow I would share the morrow's happiness my whole life through[36] (l. 1111−15).

Although the word is here used in the plural, the strict rules of poetic metres and the context of the speech have to be taken into account. Euripides clearly refers to personal behavioural manners and not to objective customs or ways of thinking. What is at stake here is the adaptability of character traits to divergent situations, together (though separately mentioned) with the adaptability of thought perspectives (*δόξα*). Voluntary choice or education may alter one's character traits. A quote from the *Suppliants* confirms this view:

> for noble nurture carries reverence with it, and every man, when once he has practised virtue, scorns the name of villain. Courage may be learned, for even a baby learns to speak and hear things it cannot comprehend; and whatever someone has learned, this it is his wont to treasure up till he is old. So train up your children in a virtuous way[37] (l. 911−7).

So, up to now, two possibilities have emerged: either character is stable and unchanging though it cannot be fully revealed since one may choose to (or involuntarily) act 'out of character',[38] or a person's character is flexible, adaptable, and responsive to situations. For the moment it is preferable to interpret the Greek views as considering both as valid: *ethos* may refer to deep inborn traits that, though concealable, are unchanging and with the aid of time revealed,[39] *and* it may refer to more superficial attributes and behavioural manners that can be altered either through education or through voluntary choice and subsequent habituation.[40] At approximately that time, the second half of the fifth century, the rise of the Sophistic movement gave a boost to the study of the aforementioned issues, leaving its imprint on people of all intellectual levels, from Protagoras and Plato to common folk.[41]

The rise of the Sophists[42]

The present enquiry would be incomplete, if account of the groundbreaking, intellectual developments of the Sophists was not taken. Unfortunately, the original works of this movement's exponents survive in inadequate quantity and fragmentary form. In addition, evidence of their thoughts primarily survives in works of their critics (primarily Plato) and is highly biased. It is therefore difficult for

researchers to reach fair conclusions as to the Sophists' true intellectual contribution. What is certain though is that the Sophists offered new perspectives on most issues that occupied the Greek intellectual world. Some of their ideas, based on cutting-edge theories of the Presocratics, constituted the intellectual bridge between earlier natural philosophers and later philosophical trends. The practical approach of the Sophists, supplemented by their self-determination and confidence as paid experts of knowledge, paved the way for a more pragmatic, scientific, and professional implementation of abstract and informal notions. For instance, the handbooks of Corax and Teisias in Sicily transformed the previously scattered rules of rhetoric into an art, consequently urging subsequent thinkers (such as Antiphon) to research and experiment in more precise fields.[43]

The ideas of the Presocratics concerning the origin and nature of the cosmos, and the doubts they raised about the order and the divine source of the physical world, found fertile ground in the restless minds of the Sophists, who pushed this enquiry forward. As Guthrie writes:

> We are entering a world in which not only sweet and bitter, hot and cold, exist merely in belief, or by convention, but also justice and injustice, right and wrong.[44]

The antithesis between *nomos* and *phusis* is transferred from the cosmological sphere to the essential questions about human nature. To what extent does *phusis* endow humans with certain and unchanging attributes? What influence do acquired beliefs and conventions have on a person? Is man by nature a political animal or does his savage nature have to be tamed and suppressed? Finally, is human virtue innate or subsequently acquired and what implications does this have for the conception of a person's character? These sample questions are unavoidable in order to understand the Sophistic movement's contribution to the original question, i.e. whether a person's *ethos* is innate, stable and unchanging.

The enquiry begins with some common ground upon which divergent opinions may be offered. This common ground is the assumption that human nature in its original state is so savage and self-seeking as to be unable to form ordered and civilised political communities. Human nature needs rectifications (or adjustments) in order to act in obedience to society's cooperative values. This is skilfully portrayed in Plato's *Protagoras*. In this dialogue, the famous sophist is Socrates' interlocutor. The subject of the dialogue is the unity of virtue and whether it is teachable. Protagoras' famous claim was that he could teach *arête*[45] (virtue), a thesis that Socrates doubted, questioning the very 'teachability' of virtue.[46] The great sophist's whole intellectual testament was thus at stake. Conversing with elegance and skill, Protagoras finally tempts Socrates towards accepting that virtue is teachable.

What is of major importance here is the fact that, for Protagoras, humans are equipped by nature with *ἐντεχνος σοφία* (practical wisdom) but lack the so-called quiet, cooperative virtues, which are essential to the formation of ordered communities. The natural (of varying degree among humans) intelligence should be

supplemented by moral virtue.[47] Therefore Zeus ordered Hermes to provide *all* humans with *aidos* and *dike*

> for cities cannot be formed if only a few have a share of these as of other arts. And make thereto a law of my ordaining that he who cannot partake of aidos and dike shall die the death as a public pest (322d).

Therefore, humans are receptive to virtue which, although not innate, can be subsequently acquired, thus can be taught. *Nomos* (in the form of both positive law and ethics) must be employed to improve human *phusis* for the sake of polis-formation.[48]

Protagoras, however, discloses an implicit compassion for the natural state of humans. Other Sophists are less lenient. Nature is disorderly and varies with the individual. Human nature may be corrupt, savage and self-seeking. Actually

> there was a time when the life of men was disorderly and beastlike, the slave of brute force, when the good had no reward and the bad no punishment. Then, as I believe, men laid down laws to chastise, that justice might be ruler and make insolence its slave, and whoever sinned was punished.[49]

According to this developmental view of human civilisation, *nomos* was the catalyst that liberated humans from their savage nature and allowed them to prosper. On the other hand, there were people who questioned this civilising ability of *nomos*, though still accepting that humans are naturally inclined towards wrongdoing; for they alleged that self-seeking interest is the strongest, everlasting instinct. These 'realists' (as Guthrie names them) retain the gloomy picture of humans' original state, though doubting of whether this can be truly altered. For them, habituation in moral virtue does not transform human nature. A superficially wholehearted adherence to quiet ethical norms simply forms a pretext, until the necessary conditions for the true human nature's exposure are met.

Thrasymachus in Plato's *Republic*[50] (regardless of the extent of his picture's distortion) poses a good example of a 'realist'. For thinkers like him justice is identified with the interest of the stronger. The complexity, relativity and subjectivity of common beliefs and the self-interested denotation of moral canons do not actually allow scope for an objective, universal approach. As long as a person has the power to fulfil his wishes, the true justice or injustice of his cause is irrelevant. In other words, as Glaucon and Adeimantus suggest, a man in possession of the ring of Gyges (that conferred invisibility on its wearer), would certainly reveal true human nature by showing that no one could resist the temptation of committing an injustice for his (supposed) self-interest, with the foreknowledge that it would not be punished.[51] There is no value judgment in this conclusion. It is simply a (pessimistic) observation of the *natural necessity* that induces this course of events. Human beings' inner self is guided by the laws of nature which dictate the pursuit of self-interest as the only true and unchangeable disposition.

Human laws and morals merely act as a deterrence which, whenever possible and profitable, will be disregarded. *Nomos* can only suppress natural disposition; it never alters it.

The aforementioned issues lead to the question of the legitimacy of human laws that are designed to suppress nature. Hippias refers to human law as the 'despot of mankind, (which) often constrains us against nature' (Plat. *Prot.* 337d). Callicles, though declaring himself not a sophist, claims that

> the fact is this: luxury and licentiousness and liberty, if they have the support of force, are virtue and happiness, and the rest of these embellishments—the unnatural covenants of mankind—are all mere stuff and nonsense (Plat. *Gorg.* 492c).

Human justice is inferior to natural justice; man-made laws are unnatural (thus illegitimate) attempts of the weak and incompetent to inhibit the natural (thus legitimate) laws which bless anyone who has the strength and ability to satisfy his needs and rule. Human nature is not simply unchangeable but should also be inviolable.

To conclude then, the Sophistic movement and its era left an invaluable intellectual testament. What is particularly relevant to this study is the Sophist's common belief that man in his original state is not naturally endowed with those virtues that are necessary for the formation of communities; indeed, the opposite would be closer to truth. Men may naturally differ in their intellectual and physical abilities (and capabilities) but still share certain 'beastlike' traits and dispositions, which stand apart from the (ideal for cooperation and coexistence) quiet ethical virtues. These are subsequently acquired and, depending on natural adaptability, education and practice, they may be perfected.

The extent to which these virtues are expressions of a single virtue (*arête*) and how this latter may be defined are open to examination. The importance lies in the fact that these characteristics (e.g. justice, moderation, self-control) constitute expressions of human character (*ethos*) and are acquired through the course of one's life. Disregard of shared laws and norms of a community may reveal (apart from a superficial propensity to committing a particular crime) a person's incapability or unwillingness to 'partake of respect and right, and [they] shall die the death as a public pest'.[52] Punishment and reprobation act as deterrents for future pests; as a result, 'virtue can be instilled by education' (Plato, *Prot.* 324b). Doubt may be expressed as to how deeply virtue can be instilled and change human nature, but it seems plausible to suggest that for all the Sophists, at least as far as quiet virtues are concerned, a man's *ethos* differs from a man's nature (and thus is not inherent by nature). Either superficially (through the suppression of natural vices) or deeply (through a wholehearted and honest adherence to conventional norms), one's character as exposed by one's life cannot be defined as 'natural'.

This has important implications for the original question (whether character is stable and unchanging). If the first conclusion is taken as true ('superficial

adjustment'), the *true nature* of a person's character is very rarely revealed and, if so, expresses only the worst. What we observe in everyday dealings would only be expressions of this person's *imposed* character. In other words, if every man's nature is self-seeking and decides everything in terms of raw interest (but is suppressed), then the deployment of any conventional virtue would be superficial, dishonest and calculative. On the contrary, any expressive act of the *true – natural – character* would be very carefully concealed from the public to avoid reprobation. Therefore, the question should be translated to 'in what circumstances can we identify a person's true character?' Yet, if everyone's nature is in essence beastlike, this query becomes meaningless.

On the other hand, if the second conclusion is taken as valid ('deep adjustment'), character is not natural and, undoubtedly, not unchanging. Humans have natural abilities (mainly intellectual), though what they call ethical dispositions are acquirable. Human nature may be altered and improved from its savage original state, which means that character may be adjusted to fit the particular circumstances and communal demands. Virtue (however defined) can be taught and character traits may be altered either through education or through partaking in conventional norms. For the exponents of this thesis, 'neither *nomos* nor the political virtues are "by nature", but a "return to nature" is the last thing that is wanted'.[53]

The theories of the philosophers

A complete analysis of the Platonic and Aristotelian positions on the subject is definitely unattainable. Nevertheless, staying focused on the primary question of the stable or changeable nature of human character will render their ideas comprehensible. In addition to this main enquiry, supplementary conclusions as to the philosophers' ideas of human character will be illustrated.

The ideas of Plato

Clarification of some methodological issues concerning Plato is a prerequisite for the following discussion. Awareness of Plato's intellectual progress through the course of his life, as exposed by his gradual disengagement from the Socratic influence (to the extent that research can specify it) and the tireless development of new concepts and ideas, compels the treatment of his writings in the current study to follow an improperly unified manner. Minor detours and inconsistencies will not be emphasised since the aim of this enquiry is to reveal the complex nature of Greek ideas of 'character' in the sense that it cannot be reduced to simple aphorisms. Indeed, Plato's own continuous dialectic on the matter, which led to rejections and affirmations of previously developed ideas, proves this very assertion. Moreover, Plato's intellectual detours may be regarded as slight, insignificant deviations in what is overall a coherent Platonic theory.

The main questions to be asked are similar to those addressed by the Sophists (whose influence on Plato's themes of enquiry is great). They include whether human nature is fixed and inescapable, whether 'character' is unchanging, and

what is the influence of education on a person's moral configuration. To use Meno's words:

> I wonder whether you can tell me, Socrates, whether arete is teachable, or, if not teachable, at least a product of habituation. Or perhaps it isn't the kind of thing one can practise or learn, but is a natural human endowment (*Meno* 70a; 86d).

This enquiry alone, and because Platonic *arête* has undoubtedly an ethical connotation,[54] would suffice to prove that the Greeks had not reached undeniable conclusions as to the fixity of human *ethos* (cf. *Meno* 95b). To support this, Socrates' hypothetical answer of any Athenian layman to Meno's question may be cited:

> Stranger, you must take me to be high in the gods' favour, if you really think I know whether or not arete is teachable or how people come to get it (Plat. *Meno* 71a).

This question will be considered in due course. First, as a prerequisite, Plato's view of human nature has to be understood.

A question on Plato's view of human nature unavoidably staggers between myth and reality. Reference to two famous Platonic myths, the Chariot myth in the *Phaedrus* and the Foundation Myth in the *Republic* is unavoidable. Starting with the second myth, which is not free from controversy, I quote in full:

> While all of you in the city are brothers, we will say in our tale, yet God in fashioning those of you who are fitted to be Rulers mingled gold in their generation, for which reason they are the most precious—but in the Auxiliaries silver, and iron and brass in the farmers and other craftsmen. And as you are all akin, though for the most part you will breed after your kinds, it may sometimes happen that a golden father would beget a silver son and that a golden offspring would come from a silver sire and that the rest would in like manner be born of one another. So that the first and chief injunction that the god lays upon the Rulers is that of nothing else are they to be such careful guardians and so intently observant as of the intermixture of these metals in the souls of their offspring, and if sons are born to them with an infusion of brass or iron they shall by no means give way to pity in their treatment of them, but shall assign to each the status due to his nature and thrust them out among the artisans or the farmers. And again, if from these there is born a son with unexpected gold or silver in his composition they shall honour such and bid them go up higher, some to the office of guardian, some to the assistanceship, alleging that there is an oracle that the state shall then be overthrown when the man of iron or brass is its guardian (Plat. *Rep*. 415a−c).

Plato dreams of a peaceful and well-ordered state, specifying meritocracy as its ultimate purpose. In other words, Plato aims at an 'aristocracy of talent'.[55] What

is of importance to this study is Plato's true (though poetically expressed) belief in a form of natural selection through an innate gradation of skills. Humans are not born equal, at least as far as their aptitudes are concerned. Intelligence, talent[56] and ability may vary and this is likened to unequal quantities of gold, silver and iron. For Plato, human breeding may be compared to horse breeding in reaching a desirable result, although the outcome is not mathematically guaranteed. Nonetheless, amid their natural differences, they have one most important characteristic in common: they are brothers, they come from the same race, they are humans. This observation leads to the second Platonic myth, as presented in the *Phaedrus* (246aff.). Of concern here is not the souls' composition or its tripartite nature, but their experiences before incarnation. The myth will be explained under three axes: a) common experience of the Forms, b) *recollection* of the Forms and c) individual choice.

The first Platonic belief is the one that puts each individual human being under the auspices of common nature. This refers to the souls' state and experiences before incarnation, when these dwell outside the sky's sphere as followers of the gods. There, they experience the sight of the true Forms, namely the unborn, eternal and unique expressions of notions such as Beauty, Justice, and Sophrosyne (*Phaedr*. 247e–248b). What is common to all souls that (after some failure) occupy human bodies is that they have necessarily experienced these true Forms (249b, 249e). This has a significant implication:

> For a human being must understand a general conception formed by collecting into a unity by means of reason the many perceptions of the senses (Plat. *Phaedr*. 249b–c).

Every person has the ability to do this by the mere experience of the Forms. Nevertheless, since the degree of this experience varies, the soul that has seen the most will lead the human life of a philosopher while the one that has seen the least will lead the life of a tyrant; the rest are classified accordingly. To recap up to now, for Plato, all human beings are of the same race and have by nature the ability to identify and conceptualise the sensate expressions of the Forms. Yet, the degree of their heavenly experience may influence their ways of life. This latter issue may have significant influence on these souls' ability for *recollection*. Thus, before considering the other implications of the 'chariot myth', it is first necessary to link it with Plato's broader theory of knowledge as recollection.

This theory should probably be ascribed to Socrates. Both his famous paradox (that no one does wrong voluntarily and, therefore, knowledgeably) and the maieutic methodology perfectly suit it. The basic features of this theory are presented in the *Meno*. There Socrates tries to experimentally prove to Meno that what humans call 'knowledge' is nothing but recollection. Deep introspection and dialectic reflection permit to the individual access to material that he already has as innate. What humans understand as 'learning' is a process of serious dialectical testing of their beliefs. Socrates' methodology (the *elenchus*) provides the

necessary process for this recollection. Our beliefs may be true or false but we can never find out unless they pass the touchstone of rational questioning. During this process, reminiscent in a way of Socrates' interlocutors, we may end up in *aporia*. This is nonetheless the first step towards true knowledge, since it allows for the rejection of false beliefs and further reflection on ones undecided. Therefore, a person who has honestly dedicated his life to such a quest for the truth cannot end up with false outcomes, since the truth exists already inside him. In addition, this truth is common to all humans (due to their experience of the Forms), therefore they all share (apart from a common nature) a common inherent experience of truth. No one who undertakes such an effort can be consistently bad or immoral (since his false beliefs would be rejected). Only good people can have consistent characters.[57]

For Plato the knowledge humans acquire in the course of their earthly lives is not external, but simply a recollection of material they already have access to, engrained in them before incarnation due to the experience of the Forms. As has already been said, its degree varies and this may have implications as to the easiness of this recollection.[58] At this point, the concept of 'individual choice' becomes relevant. Regardless of the type of life reserved for a person due to the degree of his experience of the Forms (philosopher, tyrant and so on), this person remains free to live it justly or unjustly.[59] Fallen souls (their falsity attributed to lack of knowledge/recollection)

> falling to earth, were so unfortunate as to be turned toward unrighteousness through some evil communications and to have forgotten the holy sights they once saw (Plat. *Phaedr.* 250a).

Nevertheless, this is not the end of the story. Plato wholeheartedly believed in the value of education and the fact that virtue can be taught.

Plato's whole life proves one point: he strongly believed in human progress and devoted his life to this cause. Being the offspring of a powerful *oikos* belonging to the higher class of Athens, he did not hesitate to dedicate himself to philosophy. He envisioned a perfect, just state, where the matching of upright community ethics with the individual's virtuous internal *ethos*, would allow a person to live in accordance with true justice. For Plato, education was of utmost importance for human souls. His contemporaries were profited by the establishment of the Academy, the rest of us by his written works. Every human soul, by its nature, carries a memory (which may become nostalgia) of the Forms and has the ability to dig deep and uncover it. The moral environment must be undoubtedly appropriate, and proper education may prove expedient for the cause.

In the *Republic*, a large part is devoted to a detailed analysis of education which, in addition to a receptive nature, would produce the ideal state's Guardians and Philosopher-Kings. Character can thus be shaped through education. Indeed, proper upbringing produces good men. Harmony penetrates deeply into the human mind and so this person grows in true goodness of character.[60] Individuals should learn from their youth to recognise beauty and goodness in all their manifestations.

This is the only way to participate in the true nature of the good. Music, literature, intellectual and physical education contribute to a common aim: virtue. Corrupt humans can still change and improve their character. Disoriented due to ignorance, having forgotten the beauty of the Forms, they are in desperate need of proper alignment. Although one's disposition and talents are partially predetermined prior to incarnation,[61] *ethos* is open to amendment.

In the dialogue *Laches*, Socrates challenges his interlocutors to prove their suitability for the role of educators. How can someone test it? Socrates gives the answer in telling them:

> please, could you give examples of people whom you have taken in hand and whose characters you have changed from bad to good (Plat. *Laches* 187a).[62]

The tripartite human soul contains an irrational, intractable part, which needs to be tamed and controlled. The rational part, as another charioteer, has to take all the necessary measures to enforce its will. This is a continuous, intense process, manifestations of which may be experienced through the course of one's life. However, a philosophic life provides the charioteer with an iron bridle, with which he can discipline the bad horse and restore the chariot (soul) to order.[63] Repetition of this punishing (yet didactic) process creates habitual responses,[64] allowing the rational part to rule and forcing the irrational to obey with fear and respect.[65] Provided that a soul has not been corrupted to an irreversible degree, therapy through suitable schooling is possible.[66]

It may be tempting to suggest that the aforementioned evidence reveals a Platonic belief in the indivisibility of a person's character. What I mean by this is that a person has a similar dispositional response to every situation, regardless of the stimuli. Yes, there is some truth in this, but only a half-truth. As noted above, for Plato virtue is knowledge in the form of the proper recollection of the Forms. Provided that a person has reached a state of 'knowledge' that allows him to remember the true Forms and act accordingly, his *ethos* becomes stable and directed towards the 'true good'. However, the possibility of going astray remains, in the event that the rational part leaves the soul unguarded.[67] On the other hand, a morally corrupt person, who due to this fact lacks the ability to dialectically and aesthetically experience the reminiscence of the Forms, is unstable and impulsive, responding spasmodically to different stimuli, though constantly (unless by chance) in an unethical direction. In such a person's soul, the wicked untamed horse has grown so powerful as to take control of the chariot, leading it to disaster.

All the above reveal a deep and sophisticated belief in the changeable nature of the human soul (from bad to good and not the opposite, since once someone becomes truly good, he has already established access to the Forms). By the same token, a belief in the changeable nature of human character may be adduced. All virtuous characteristics, such as moderation and self-control are acquirable, through the recollection of the Forms. As a result, Plato may not be supposed to share the pessimistic view of the Sophists as regards human nature. Human souls

were once followers of the gods. They took part in this mystic initiation which occurs before incarnation; they experienced the Forms. They are neither good nor bad,[68] though they carry the notion of the 'truly good' hidden inside them. Human nature is not even close to the picture of savagery, desperately needing rehabilitation through instruction. For the Sophists, education comes to suppress and conceal innate vices; for Plato education comes to illuminate and regenerate innate virtues.

The works of Aristotle

In what follows, an abbreviated account of Aristotle's ideas of 'character' will be offered. Since Aristotle's theses will be further highlighted in the following chapters, namely the ones that focus on *ethos* in relation to forensic rhetoric, the present discussion will be as abridged as possible. Aristotle's first significant original contribution in the comprehensive theory of *ethos* is the dissociation of moral progress from growing intellectual knowledge. For Aristotle, the correct process of moral progress deviates from the traditional account of virtue as an ideal that a person has first to comprehend and acquire in order to use it. On the contrary, virtue(s) are attained by exercising and practising them on a constant basis, in an intentional, voluntarily chosen manner. For him

> the virtues therefore are engendered in us neither by nature nor yet in violation of nature; nature gives us the capacity to receive them, and this capacity is brought to maturity by habit (*Nic. Eth*. 1103a).

Human ethics need to be detached from nature, for human action is not knowable and predictable as cosmic or natural events are. Human action in practical life cannot become the content of knowledge in the same way as a cosmic phenomenon or a technical procedure.[69]

For Aristotle, practical human action is determined and evaluated by reference to rules and norms relative to the environment. In his accounts of *ethos* in the *Poetics* or in the *Rhetoric*, he presupposes a kind of ethical consensus in the audience as a precondition for a proper response to tragedy and epic as well as oratory.[70] Evaluation of individual actions is effected with reference to acceptable socio-ethical norms. For instance

> we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts. This truth is attested by the experience of states: lawgivers make the citizens good by training them in habits of right action—this is the aim of all legislation, and if it fails to do this it is a failure; this is what distinguishes a good form of constitution from a bad one (*Nic. Eth.* 1103b).

However, habit and chance are not sufficient for the attainment of virtue. Precisely at this point a sort of 'knowledge' comes into play. The agent must *knowingly*

choose to perform these habitual virtuous acts, simultaneously being in a certain state of mind:

> first he must act with knowledge; secondly he must deliberately choose the act, and choose it for its own sake; and thirdly the act must spring from a fixed and permanent disposition of character (*Nic. Eth*. 1105a).[71]

Since the virtues are neither endowed by nature, nor are they emotions or capacities (cf. 1106a), Aristotle asserts that they must be dispositions. But what does he mean by 'disposition of character'?

> The dispositions (*ἕξεις*) are the formed states of character in virtue of which we are well or ill-disposed in respect of the emotions; for instance, we have a bad disposition in regard to anger if we are disposed to get angry too violently or not violently enough, a good disposition if we habitually feel a moderate amount of anger; and similarly in respect of the other emotions (*Nic. Eth*. 1105b).

These dispositions are not predetermined by nature but moulded through individual choice and practice.[72]

> Not to know that it is from the exercise of activities on particular objects that states of character are produced is the mark of a thoroughly senseless person (*Nic. Eth*. 1114a).

Individuals are therefore responsible for their character traits, to the extent that they may be characterised as 'voluntary', and consequently be justly blamed.[73]

However, mere consciousness of behaving in a certain manner does not provide an opportunity for change. Habit may have already become second nature, shaping the individual's deliberate choice of the means and ends (*προαίρεσις*), in accordance with one's accepted ethical standards. Habitual virtues and vices are dispositions affecting the choice which the intellect has to make afresh in any given situation (*ἕξεις προαιρετικαί*). Practice of these is deliberate, and practice enables their consolidation so as to form a more general character disposition. The resulting consolidation of such traits leads to voluntary (thus blameworthy), though possibly inadvertent, responses. In Aristotle's words

> when you have let a stone go it is too late to recover it; but yet it was in your power to throw it, since the moving principle was in you. So, too, to the unjust and to the self-indulgent man it was open at the beginning not to become men of this kind, and so they are unjust and self-indulgent voluntarily; but now that they have become so it is not possible for them not to be so (*Nic. Eth.* 1114a).

The above discussion reveals Aristotle's belief in human emancipation, at least in an early stage of life, as far as the forging of individual 'character' is concerned. Nevertheless, by introducing the notions of voluntary choice and intentionality in practical life (cf. 1109bff.), Aristotle favoured an 'interactionist' approach as opposed to sheer determinism. Apart from fixed character traits, other conditions also influence human action. In real life, the practical intellect (as opposed to the theoretical one) is the main contributor to decision making, in conjunction with one's dispositions, taking into account the surrounding circumstances of each situation. Chances for the exhibition of ideal (*in vitro*) freedom of choice are hardly presented in everyday life, where other factors have to be weighed. For this very reason, and since only deliberate action accurately reveals an individual's *ethos*, human actions have to be evaluated by reference to the situation at hand.

This can be illustrated by reference to two examples (1110a): if a tyrant were to order a subject to do something base, having his parents and children in his power, or if a ship's crew throws the goods overboard in a storm (for in the abstract no one throws goods away voluntarily, but on condition of its securing the safety of himself and his crew, any sensible man does so). Both the terms, then, 'voluntary' and 'involuntary', must be used with reference to the moment of action. To distinguish the voluntary and the involuntary is presumably necessary for those who are studying the nature of virtue, and useful also for the legislators with a view to the assigning both of honours and of punishments. Because virtue is concerned with passions and actions, and on voluntary passions and actions praise and blame are bestowed, on those that are involuntary pardon, and sometimes also pity, to distinguish the voluntary and the involuntary, is presumably necessary for those who are studying the nature of virtue, and useful also for the legislators with a view to the assigning both of honours and of punishments (1109b).

The aforementioned reference to passions is significant in yet another respect: they link to the Aristotelian concept of *hamartia*.[74] In that sense, a person may erroneously act in the grip of *pathos* (passionate emotion), instead of acting in accordance with his generally stable *ethos*. Emotional passion may lead to a wrong judgment which, though not always morally unacceptable, leads to negative results. *Pathos* may thus temporarily suspend and overcome the relatively predictable expression of fixed character traits; fault may consequently result from acting contrary to one's *ethos*. This does not entail a more general wickedness of character or badness of the particular emotion. It simply highlights an incidental badness caused by an inappropriate (as regards the context) acting on that emotion. In other words, a person's emotional state may be justified, albeit knowledge of when, where, and how he should act upon it determines its quality.

A parallel state to *hamartia*, though more permanent in nature and concentrating on reason rather than emotion,[75] is *akrasia*.[76] The term is opposite to *enkrateia* and means 'lack of control' or 'weakness of will'. It describes a persistent state of the soul; one on the basis of which the doer habitually acts. This state of *akrasia* can be described as the intellectual knowledge of the right action (based on reasoning,

assisted by one's correct general beliefs) but failure to commit it due to one's desires. In other words, with *akrasia*,

> it must be the case that someone who is being led by desire to enjoy a pleasure he thinks he should not enjoy must no longer be holding together the line of reasoning which forbids him from enjoying it. But it is not the correct general belief that he has abandoned: he held to it before the akratic episode; he holds to it afterward; and in the interim he does not undergo an intellectual conversion or corruption. Thus, during the akratic episode, some particular belief must be in some way lacking, of the sort which would have made his general belief effective.[77]

This disharmonious state of the soul (where the intellect does not coincide with the impulses), stands between the perfect harmony of intellect, impulses and action (*arête*) and perfect disharmony (*kakia*). In the case where the intellect does not coincide with the impulses but nonetheless the person acts in a correct way, this state is called *enkrateia*; this may be compared to *akrasia* as a state of an individual's ethical progress.

What can therefore be extracted from this brief discussion of Aristotle's ideas in relation to the present investigation can be summarised as follows. For Aristotle, character is not provided to humans by nature. On the contrary, it is moulded by the habitual and intentional exercise of certain patterns of behaviour, in accordance with accepted ethical standards. Nature provides for the capacity of humans to intellectually control and determine actions, choices, and even emotional responses, the quality of which is shaped through the course of one's life. Nonetheless, once the decisive point has been reached, one's *ethos* becomes unchangeable. Humans are thus blameworthy or praiseworthy for their characters and ethical dispositions, as far as this is evaluated by reference to deliberate choices. However, one's quality of character is determined (and assessed) by reference to the accepted moral norms of his environment, not against any abstract laws of nature. Thus, human *ethos* is the result of multiple components. As far as how one's 'character' may be abstracted, this has to be done inductively, by reference to a multitude of previous acts, deliberate in nature, insignificantly determined by external influences, thus capable of revealing a fixed disposition.

All these have important implications for the present enquiry, to the extent that they illuminate an insight into the Greek way of practical reasoning. Aristotle's observations are invaluable in uncovering the triggering factors of the wide use of character evidence in Athenian courts. His approach as to how one's *ethos* is to be judged, as to when an act highlights a character trait, and as to why invocation of a multitude of past acts may be necessary in order to prove one's fixed character, offers the underlying rationale behind the practice of the orators.

The practice of the orators

Having sketched thus far the intellectuals' approaches, it is now time to analyse the orators' assumptions about 'character' as presented in the forensic speeches. It has to be noted in advance that the adversarial nature of the speeches, coupled with

the fact that in the courts' setting honesty was valued far less than success, makes ideas of 'character' yet another rhetorical device at the orators' disposal. Litigants are not concerned about truth or objectivity. They present their assumptions as facts in a manner that would best fit their case. Therefore, the elasticity (and even inconsistency) with which some ideas are presented should cause no surprise. On the contrary, such manipulation reveals the absence of any fixed conclusions about 'character'. The existence of such conclusions would necessarily prevent any innovative interpretations or rhetorical handling of 'character' for fear of alienating the jurors. The present section will address the same core questions regarding the stable and unchangeable nature of character, as well as its indivisibility which, in the forensic environment, had a vital role to play.

The enquiry may begin with a foundational observation that the orators in general (presumably adhering to a widespread assumption) seem to support a relatively consistent and barely changeable character. Definitely within the course of an Athenian trial, this had its practical reasons. Within the context of a trial where litigants were the sole primary source of information and their argumentation relied heavily on arguments from probability, a moralising plaintiff, in his effort to prove the defendant's wrongdoing, was more than willing to point to the latter's past reprehensible behaviour. The assumption of a stable and unchanging disposition was necessary to pave his rhetorical path in effortlessly proving his opponent's present misconduct by reference to earlier similar instances. On the other hand, a defendant, in the absence of a certified record of criminality, could point to his earlier beneficial acts, highlighting a consistent, positive character. Furthermore, in cases where the parties could point to their opponent's previous transgressions, the accusatorial mode of trial permitted the curtailing of an adversary's credibility by reference to past misconduct. In contrast, the factor that demonstrates the rhetorical opportunism of 'character' assumptions lies in cases where one's past wrongdoing had been decidedly proven. There, counter to what has been evidenced so far, a litigant was perfectly able to argue for his rehabilitation or picture his past conduct as 'out of character'.

Is human character innate?

For the illustration of these general considerations, specific examples may be offered. The belief in a deeper unchanging natural disposition is best exemplified by Lysias in his speech *Against Alkibiades the Younger*, where he suggests that a criminal nature cannot change; as a result such a man does not deserve forgiveness due to the hope for improvement.[78] Demosthenes also, presents a belief in natural honesty, a quality which prevails through the course of one's lifetime.[79] One's reputation and reception by the general public are formed and determined by one's own past behavioural traits rather than by any scheming defamation.[80] Aeschines (in that issue) sides with Demosthenes, maintaining that natural disposition always prevails, regardless of the fact that someone may pretend to be a man of another character for a short interval.[81]

This last point raises questions as to the recognition of this 'natural character'. If a person can pretend and act purposefully 'out of character' and is free to argue for a changeable nature of *ethos*, the matter becomes complicated. For instance, Andokides felt free to argue that

> My judgment is changed now from what it was before . . . my present conduct is much more characteristic of me than my earlier conduct (Andoc. 2.24–6).

Although such kind of argumentation is rare in Athenian trials, since defendants do not admit guilt and try to conceal any past reprehensible acts, it nevertheless demonstrates a flexible approach as to the steadiness of a man's character. Within such a fluid and subjective matrix of beliefs, how can someone judge when true character is revealed? One answer is given by Lysias who suggests that

> although a person could create a false character for a short period, nobody could conceal being a criminal for a period of seventy years (Lys. 19.60).

Duration therefore forms significant evidence of one's true disposition. Consistency of good behaviour is another factor that has to be assessed. A mere single transgression may decidedly reveal an inherent character defect. Demosthenes argues that a single offence should not be attributed to a circumstantial mistake; it rather exposes the inbred true nature of a man. In his prosecution speech *On the False Embassy* he says that

> The legislator simply forbade any acceptance of bribes . . . considering that a man who has once accepted them and been corrupted by money no longer remains a reliable judge of what is good for the city (Dem. 19.7).

More analysis of this idea is provided in the speech *Against Meidias* where Demosthenes argues that

> it was not acceptable to the city that people should be honest for a time and then thieves, but only that, where the property of the community is concerned, they should invariably be honest; for it was felt that a man of that kind had been honest during the earlier period not by nature but by evil design in order to be trusted (Dem. 24.133).

The aforementioned passages reveal the depth of rhetorical manipulation of 'character', in the absence of any fixed popular beliefs. An orator could argue according to his best interests, either that one's character is stable or that rehabilitation is possible, although in principle it was more rewarding to rely on the first argument. Moreover, a clever and deceitful litigant could neutralise his adversary's record of positive actions by pointing to a (real or imaginary) opportunistic aim for this good behaviour. Therefore, for a modest, law-abiding defendant, an offence

could be described as a minor transgression that is 'out of character', whereas for the moralising plaintiff such an action exposes the earlier opportunism of the defendant, contrary to his true vile nature, in trying to create a false impression of honesty and lawfulness.

This absence of uniformity of approach suggests that in the context of an Athenian trial, almost any (even remotely relevant to the offence) past act, could be invoked to assist the argumentation of a litigant. This is also advocated by Lysias 26 [contrary to the modern trend which renders evidence (even offences) from the distant past as inadmissible],[82] where the prosecutor directs the jury to examine the defendant's conduct during a period long past, nearly thirty years before the trial.[83] The argumentation could go even further, in reprobating someone for his ancestors' follies, and suggesting that he is a hereditary enemy of the polis.[84]

The potential opportunistic behaviour of an adversary is skilfully presented by Demosthenes in *Against Meidias*. There, the arrogant and hubristic behaviour of the wealthy Meidias is contrasted (in anticipation) to his humble performance in the court. In order to leave no space for his opponent's presentational tricks, Demosthenes warns the jury:

> Now I know that he will set up a wail, with his children grouped about him, and will make a long and humble appeal, weeping and making himself as pitiable a figure as he can. But the more he humiliates himself, Athenians, the more he deserves your hatred. Why so? If in his past life he was so brutal and violent because it was impossible for him to be humble, it would be right to abate some of your anger as a concession to his natural temper and to the destiny that made him the man he is; but if he knows how to behave discreetly when he likes, but has deliberately chosen the opposite line of conduct, it is surely obvious that, if he slips through your fingers now, he will once more prove himself the man you know so well.[85]

Within this ideological context, sudden changes in a man's behaviour could be exposed as highly suspicious. In the absence of an acknowledgement of a person's freedom of choice in every single instance of his life, deviations from normal behaviour could be easily attributed to external, dubious, causes. In the highly agonistic Athenian environment, inconsistent attitude, especially in public cases, gave rise to suspicions of bribery and corruption. This is best exemplified in the fierce forensic contests between Demosthenes and Aeschines, where each orator points to the other's aberrational acts.[86] On the other hand, in defence, such aberrations from the normal attitude could be explained by reference to the circumstances of the particular situation. Many defendants ask the jurors to try them by human standards and apply rules similar to the modern 'reasonable man test', pointing to the situational factors rather than their character. The implication is that as long as the agent did not (under the examined circumstances) fall below the attitude required by his fellow citizens, judgment should be given in

his favour. In Lysias 1, Euphiletus, the defendant in a case of lawful homicide, asks the jurors to judge him as they would judge themselves in the same situation.[87] Andokides tells the jurors:

> since you ought to reckon cases by human standards, as you would if you were in trouble yourselves: what would each of you have done? (Andoc. 1.57).

Consequently, a 'situationist' tactic was not missing from the orators' arsenal, provided that it would promote their client's best interests.

Is human character changeable?

Thus far the pre-eminence of a popular belief in an inbred, stable disposition, albeit not firmly grounded and vulnerable to reservations, has been demonstrated. These would be best discussed if the focus is slightly adapted to illuminate whether character is changeable or not. The starting point will be the relation between character and time; in other words, how far back should we look in order to find evidence concerning a person's character? Is the stereotypical assumption that youth characters are moulded by education cited in the orators? Is this also valid for men in their maturity?

Examples underlining widely held beliefs about youth dispositional traits are cited in multitude in the forensic speeches. Young men are collectively sketched as being prone to aggressiveness and drunkenness, with their eruptive temperament being responsible for their misconduct. In the balance of probabilities, it is the young that start a quarrel, whereas maturity conveys patience and calmness.[88] By the same token, youth can be blamed (or excused) for past misdemeanours. This age-disposition reveals a belief in the changeable nature of character, albeit on a group basis.

What about individual character? Andokides, who is a supporter (due to personal considerations) of the theory that a person can change through the course of his life, asks not only to be excused for his past offences but also to be pitied. He says that to err is a great misfortune, and since error and misfortune are common to everyone, the person that was so ill-starred as to err, contrary to his nature, due to his youthfulness or folly, deserves sympathy rather than hostility.[89]

Aeschines is inconsistent in his approach. In his speech *Against Timarchus* he avoids discussing the defendant's behaviour during his youth. He says:

> Observe, men of Athens, how reasonable I shall be in dealing with this man Timarchus. Any abuses he committed against his own body while still a boy I leave out of account. Let it be void, like events under the Thirty or before Euclides, or any other official time limit of this sort that has been laid down. But the acts he has committed since reaching the age of reason and as a young man and in full knowledge of the laws, these I shall make the subject of my accusations, and I urge you to take them seriously (Aeschin. 1.37).

On the other hand, during the fierce contest with Demosthenes, in his effort to ridicule him and show his bad character he recalled the nicknames of his opponent since his minor age:

> As a child he was known as Batalus for a certain readiness for humiliation and perversion. When he left childhood behind he brought suits for ten talents against each of his guardians and got the name Argas. As a man he acquired the further name common to all unscrupulous men, sycophant (Aeschin. 2.99).

Again, therefore, popular beliefs are manipulated to suit the orator's best interests, highlighting the absence of any rooted idea of the matter.

Demosthenes seems to incline towards the unchangeable nature of a man's disposition. Examples have already been cited where he characterises as opportunistic any deviations from normal, consistent behaviour. To the extent that any firm conclusions may be discerned from his biased speeches, this belief is sealed in his speech *Against Aristogeiton 2*. Although such an assumption on the unchangeable nature of a man's character suits his case, the rhetoric is striking:

> But after you had let him off, admittedly in hope of amendment, and then shortly after had to punish the same man again for speaking and acting against the best interests of the city, what reasonable excuse is left you if you are a second time hoodwinked? When you have tried him by deeds, why need you trust his words? In cases where you have not yet an accurate test ready to hand, it may perhaps be necessary to judge by words. [22] But, for myself, I am amazed that there are men so constituted that, though they deposit private property with those only whose past record shows them to be honest, they entrust public affairs to men who have been admittedly proved unscrupulous.[90]

Nevertheless, Lysias provides an example of a belief in the reformation of character:

> What inducement, then, could you have for approving this man? Because he has committed no offence? But he is guilty of the gravest crimes against his country. Or do you think he will reform? Then, I say, let him reform first in his bearing towards the city, and claim a seat on the Council later, when he has done her a service as signal as the wrong that he did her before (Lys. 31.24).

Is human character indivisible?

Indivisibility of character means that a single character trait is inextricably linked with all the others so as to form a unified (virtuous or vicious) whole. Indivisibility of character accommodates the unity of virtue and vice, as the aggregate of numerous virtues and vices respectively. In practical terms, it denotes the narrowness or the extensiveness of a single act's probative value as to the general disposition

of a person. By the same token, a belief in the indivisibility of character allows for a holistic approach to ethical traits as expressed by individual acts. A single act uncovers a particular character trait and this, in turn, sheds light on a person's general disposition. This approach is capable of relaxing the rules of relevance in courts, in the sense that it authorises the invocation of previous acts, of different proximity to a particular offence, as having probative value in relation to a person's general behaviour. To make the matter clearer, Aristotle's treatment of the issue may be cited. He argues:

> The motives which lead men to do injury and commit wrong actions are depravity and incontinence. For if men have one or more vices, it is in that which makes him vicious that he shows himself unjust; for example, the illiberal in regard to money, the licentious in regard to bodily pleasures, the effeminate in regard to what makes for ease, the coward in regard to dangers, for fright makes him desert his comrades in peril; the ambitious in his desire for honour, the irascible owing to anger, one who is eager to conquer in his desire for victory, the rancorous in his desire for vengeance; the foolish man from having mistaken ideas of right and wrong, the shameless from his contempt for the opinion of others. Similarly, each of the rest of mankind is unjust in regard to his special weakness (Arist. *Rhet*. 1368b).

Aristotle describes vices as categorised under different types which, due to their inducement towards respective negative character traits, lead to acts of injustice. An inherent character defect for, say, greed, can thus be exposed by a single act of that kind; the general manner of this defect however, will characterise all subsequent acts that fall under this category. A past act of bribery for instance may lead to the conclusion that the individual in question suffers from the vice of greed, and hence be used as evidence in a case concerning the voluntariness or not of financial mismanagement.

If this conclusion is pushed to the extreme and since all character defects end up in injustice, a proponent of character's indivisibility (or a desperate litigant) could point to past acts as revealing a propensity for wrongdoing or unlawfulness per se. Similarly, non-adherence to commonly accepted social norms (or even to a single one) may characterise an individual as a social misfit. At first glance such an approach is incompatible with modern presuppositions and rejected by the modern approach to justice. Freedom of choice and volitional capability is reserved for every single act in a person's life with every incident examined on its merits. This is where modern 'relevance' stands as regards character evidence, with the rules of exclusion overshadowing these of admissibility.

The Athenian courts evidently took a different route, as is highlighted by the broad invocation of character evidence. This route concentrated more on the general character traits as exposed by individual acts, rather than focusing on the surrounding circumstances that triggered the single disputable particular act that gave rise to litigation. Thus instead of setting the wider context which would lead

to an equitable decision or a verdict in accordance with the parties' social power, such argumentation was received as 'to the point', assisting the jurors in reaching a legal verdict. In other words, the litigants' insistence on a number of past acts, that may be received by moderns as only remotely (or not at all) relevant, can be likened to a number of (more or less elegant) touches in the portrayal of the opponent's character traits.

Direct evidence of the above considerations is provided by Aeschines. In his speech *Against Ktesiphon* he maintains that

> a man who does not love his nearest and dearest will never feel concern for outsiders like yourselves; nor could a man who is evil in his private life be of use in public life; and a man who is worthless at home can never have been a man of honour as envoy in Macedonia – he changed his position, not his disposition (Aeschin. 3.78).

He cites this passage as proof to his aforementioned discussion about the adversary's general disposition of character. Demosthenes' lack of devotion to his daughter was proven by his contemptible attitude shortly after her death when, instead of mourning, he

> put a garland on his head and white raiment on his body, and there he stood making thank-offerings, violating all decency (Aeschin. 3.77).

This – irrelevant to modern eyes – scene is vividly depicted in order to show Demosthenes' impassive and calculative disposition which characterises him and his attitude towards his fellow citizens.

A person retained his basic characteristics, which were revealed regardless of whether he acted in private or in public,[91] in Athens or elsewhere,[92] against his own body, the gods, his family or the city as a whole.[93] In these terms Aeschines explains the law on the scrutiny of orators (also applicable to any kind of scrutiny). In disfranchising the abusers of their parents, the rationale was that

> if anyone mistreats the ones whom he should honour on a level with the Gods, what sort of treatment, says the legislator, will people unconnected with him, and indeed the city as a whole, receive from him? (Aeschin. 1.28).

Regarding those who had prostituted themselves or mistreated their own body, the legislator, according to Aeschines, provided for their exclusion from public business, 'for the man who has wilfully sold his own body would casually sell out the interests of the city'. Finally, the man who has squandered his private property would treat the city's interests in much the same way.[94] The above considerations, namely the presupposition of a high degree of stability and indivisibility of character, elucidate the Athenian legal system's tendency to pass laws and judgments on the subject's merits, reserving for the idea of 'worthiness' a central role.[95]

More examples of the same approach may be given in order to clarify the issue further. Loyal to the belief of character indivisibility, Lysias provides the following statement:

> About my father – since the prosecution speeches have treated him as a criminal – please forgive me if I report what he has spent on the city and his friends. I am doing this not from a desire for glory, but as evidence that the same man does not both spend a great deal voluntarily and want to steal part of the public property despite very great danger (Lys. 19.56).

This passage, interpreted in the light of character indivisibility, provides yet another underlying rationale for the frequent invocation of past benefactions towards the city by threatened defendants. Such argumentation, instead of showing off one's economic status or asking for undeserved gratitude by referring to irrelevant considerations, was in fact relevant to the Athenian mind. A benefactor loves his city and his fellow citizens. He even uses his property, in a lavish manner, for their advantage. This reveals the disposition of a *φιλόπολις*, cancelling out his opponent's 'slanders' aiming at revealing a propensity for law-breaking. His previous beneficial acts speak for themselves.

Do all acts have the same probative value?

Before concluding the present enquiry on the orators' ideas of 'character' it is important to examine whether all past acts are afforded the same degree of probative value. For the orators, character is revealed only when a person acts intentionally and with free will.[96] Thus, if external circumstances compel a particular course of action, Athenian prosecutors avoided using it as a basis of attack.[97] The explanation of this rationale is to be found in the actual law of Athens. Demosthenes observes that

> the laws treat the wilful and insolent transgressors as deserving more resentment and a heavier punishment than other classes of offenders. First then, all the laws of damage—to take these first—order the offender to pay the amount twice over if the damage is wilful, but only once if it is involuntary. This is reasonable, because, while the injured party is in any case entitled to relief, the law does not ordain that the resentment against the aggressor should be the same, whether his act is voluntary or involuntary. Again, the laws of homicide punish wilful murder with death, perpetual exile, and confiscation of goods, but accidental homicide they treat with much consideration and charity.[98]

Usually, prosecutors referred to issues where external factors influenced a person's actions as part of a pre-emptive strategy in order to reduce the force of such arguments made by the defendants. Poverty and need were considered as the most significant external factors compelling a person to act in a reproachable manner. Thus, opponent's actions which could be attributed to such factors were

usually omitted. As early as Antiphon's Tetralogies the hypothetical prosecutor recognised that 'Need can compel anyone to speak and act against his nature'.[99] Lysias regarded such action as involuntary and in generalising this assumption he observes:

> It is a custom accepted as just among all mankind that in face of the same crimes we should be most incensed with those men who are most able to avoid criminal action, but should be indulgent to the poor or disabled because we regard their offences as involuntary (Lys. 31.11).

Demosthenes acknowledges this fact and before initiating character assassination he exclaims

> I shall pass over what may be blamed on poverty, and will proceed to specific charges against your character (Dem. 18.263).

On the other hand, a person reveals his true character as soon as he acquires the power or wealth to behave insolently. The prosecutor of Lysias 28 accuses characters like the defendant's that

> As soon as they become rich, they come to hate you, and they are no longer prepared to be ruled by you but to rule over you (Lys. 28.7)

thus revealing their true character. In the passage mentioned earlier, where the prosecutor of Euandrus, in Lysias 26, refers to blameworthy behaviour occurring nearly thirty years before the trial, he justifies this choice as follows:

> As to his love of quiet, I say that we ought not to investigate his sobriety today, when there is no chance for him to be licentious: we should rather examine that period in which, being free to choose either way of life, he preferred to mark his citizenship by illegal acts. For the fact of his committing no offences now is due to those who have prevented him; but what he did then was owing to the man's character and to those who vouchsafed him a free hand.[100]

Thus it may be concluded that, together with youth, some external factors could lead to the voluntary exclusion of particular acts from those that could be invoked as character evidence.

Apart from poverty and need, other factors could be invoked as mitigating one's blameworthiness due to a lack of complete sobriety. Drunkenness,[101] anger, and love[102] could be adduced in that respect. Demosthenes, in his effort to distinguish the present case from an earlier precedent which could be used by Meidias as a plea in mitigation, points to exactly these issues:

> Then again we shall find that he has not the same claim to consideration as these others. For in the first case the man who struck the judge had three

> excuses: he was drunk, he was in love, and he did not know what he was doing in the darkness and the night. Polyzelus again explained that owing to his ungovernable temper he had lost his head when he committed the offence; there was no hostility behind the act and no intention to insult. But Meidias cannot plead any of these excuses.[103]

Furthermore, the time and place of the act posed as indicative factors, undoubtedly revealing one's true character. Demosthenes, again, insists more than once that an attack taking place during daylight and in full publicity is extremely likely to expose the hubristic and insolent nature of the perpetrator.[104] The fact that he

> was assaulted by a personal enemy early in the day, when he was sober, prompted by insolence, not by wine, in the presence of many foreigners as well as citizens, and above all in a temple which I [he] was strictly obliged to enter by virtue of my [his] office (Dem. 21.74)

further clarifies the issue. All these factors therefore should be considered when deciding the intention and voluntariness of an act, which unquestionably expose a person's true character.

Punishment and character

This survey would have been incomplete if a brief reference to the Athenian rationale for punishment in relation to assumptions about 'character' was not offered. The scope is limited to the examination of Athenian methods of punishment in light of their consequences on their ideas of 'character'.[105] What best characterises the Athenian legal system is its quite frequent draconian penalties, especially illustrated by the imposition of the death sentence.[106] Such harsh measures at first glance may support the absence of any belief in rehabilitation, with retribution being the only means of exacting justice. Nevertheless, from Homeric times, restitution and retribution can be regarded as the founding pillars of the Greek penal system.[107] Remnants of a primal approach to justice are also to be found in the Athenian legal system.[108] The Athenians, although advertising their penal system as democratic and humanistic, were in reality not remote from the other Greek poleis.[109] As has been demonstrated, Greek philosophers had developed a rational belief in mental and ethical reform, sufficient to transform the penal system so to primarily aim at the rehabilitation of offenders. Nonetheless, in Athens, this transformation did not occur.

Athens was above all a Greek polis. It found itself in a constant state of war, so any internal disorder should be gravely punished. Hence, widening its perspective, the Athenian legal system ought to concentrate on the welfare of the society rather than the individual. In such a way, the draconian penalties can be explained in terms of deterrence, rather than seen as measures exposing certain ideas relating to the changeable nature of 'character'. Death, total *atimia*, and exile, even though

considered harsh and inhumane penalties, practically achieved the twofold aim of (one way or another) getting rid of a social misfit and having a deterrent effect on potential future criminals.[110] The need for this is particularly verified by the Athenian legal system's weakness in bringing criminals to justice, in the absence of policing and enforcement mechanisms.

The above conclusion that the Athenian methods of punishment are not decisive as to their ideas of 'character' may be supported by the existence of *timesis.* During this process, both litigants proposed just – in their view – penalties, between which the court had to decide. Nevertheless, the *agones timetoi* included very serious and reprehensible offences.[111] Since guilt had already been proved, punishment in accordance with a belief that character is unchangeable would signify the automatic categorical infliction of the harshest penalty. On the contrary, the condemned offender could propose a milder penalty, even a fine, which means that a non-rehabilitated criminal would be set free and remain socially active. Definitely, questions of proportionality come into play which, nevertheless, cannot neutralise the effect of this procedure in relation to the Athenian ideas of character.

On the other hand, other offences were treated less harshly, expressed by the pecuniary penalty of fine or confiscation. Imprisonment was rarely inflicted, usually reserved for those awaiting trial. This is the other side of the coin and, since it is highly unlikely that the Athenians had distinguished crimes open to rehabilitation from others that are not, it has to be maintained that their methods of punishment do not illuminate their assumptions about 'character'. This can be additionally demonstrated by the (in some, admittedly limited, cases) existence of multiple procedures and penalties with which an offence could be punished.[112] If the same act could be both prosecuted in a private trial and punished with a fine *and* in a public trial punished with death, this cancels any further discussion that connects punishment with Athenian presuppositions of an unchanging *ethos*.

Finally, the example may be adduced of partial *atimia*, whereby the perpetrator is prohibited from exercising the type of civic action in relation to which he was punished. In cases of guilt for illegal proposals, the offender incurred this type of penalty after three condemnations by the court. On the other hand, when a plaintiff failed to get one fifth of the votes or withdrew the case before the hearing, this type of *atimia* (prohibition of bringing the same type of prosecution) was inflicted on the first occasion. Hence, it may not be adduced of Athenian belief either that repetition (three times) reveals propensity or that a single time is sufficient. So, again, this divergence can be explained by taking into account a desire for proportionality. Moreover, the fact that the offender was, in these cases, punished with partial *atimia* of specific scope precludes the conclusion that the Athenians believed in a total indivisibility of character. Therefore, Athenian methods of punishment may reveal the underlying rationales of deterrence, retribution and restitution. However, in the case of offenders' rehabilitation, which is relevant to the question of 'character' stability, it would be unsafe to offer any firm conclusions. Definitely, this is a fertile area for further research.

Conclusion

In order to complete this chapter it is essential to point to some final connections of the Greek ideas of character with the evidence used in Athenian courts. The implications of these ideas will be further highlighted in subsequent chapters, in which it will be discussed in detail why the Athenians used 'character' in their courts, how they invoked it, and what issues this argumentation included. All these matters will be analysed on the basis of the aforementioned enquiry. The above Greek ideas of 'character' will offer a fresh viewpoint, providing for a new mode of interpretation. Consequently, a delineation of the axes upon which the following chapters will be designed is essential.

First of all consideration has to be given to the highly flexible approach of Athenian assumptions about 'character'. The poets, in particular, with their divergent suggestions, educated the masses in a non-dogmatic way of approaching such complex issues. Following the characteristic open-mindedness of the Greek intellect, the multiple contrasting beliefs concerning 'character' allowed for an equally flexible, though inconsistent, approach by the orators. Hence, the rhetorical manipulation of the issue should be attributed to the absence of fixed presuppositions. Nevertheless, the fixed confidence in the probative value of *ethos* assisted the wider use of character evidence for rhetorical purposes. Also, the conviction that a person is totally responsible for his actions (excluding the exceptional circumstances discussed above) and that these result from a relevantly consistent character, permitted the unproblematic attribution of guilt and blameworthiness without raising further complications.

The extensive (to a great degree compared to fragmented modern societies) ethical consensus of the juries, gave rise to common rhetorical patterns of argumentation (*topoi*) which were developed through time.[113] These patterns were based on common standards of behaviour (reminiscent of the modern 'reasonable man') and were extended so as to include a demand for the individuals' adherence to common norms. Thus, as it will be shown in subsequent chapters, a person who understood himself as an integral part of the community with an assigned role, perceived these norms as setting the level of moral blameworthiness or praise.

Another feature of character evidence in the courts of classical Athens that has to be discussed is the invocation of many examples of previous behaviour in order to reveal one's character. This has to be explained by reference to both the (familiar to the Greek intellectuals) inductive mode of thinking and to the practical reason of avoiding a counter-plea of opportunism. If there was not the uncertainty as to the extent to which Aristotle's theory of habitual (repetitive) behaviour appealed to the popular masses, it could have been included in the aforementioned reasons. After all, Athenian litigants, by referring to numerous past acts, aimed to expose a fixed character trait rather than an opportunistic 'out of character' behaviour.

Additionally, the belief in the existence of different 'groups' of traits (e.g. greed, dishonesty etc.), permitted seemingly divergent and irrelevant past actions

(that, nonetheless, fell under a certain behavioural category) to be adduced in order to prove a particular virtue or vice. The potential acceptance of the unity of virtue or vice made an individual good or bad per se. As a result, under this extreme but not impossible scenario, any past act (even irrelevant to the particular charge by modern standards) that revealed the general virtue or wickedness of a person could be invoked in support of a litigant's case. In other words, since unlawfulness reveals antisocial behaviour, any apparent non-adherence to social norms would point to the same direction. Since a person with an evidenced particular vice can be characterised as wicked overall, and breaking the law is also wicked, this particular vice (even if it is irrelevant to the offence) can be offered to expose the wickedness.

Finally, the Athenian supposition that an individual may change through education or at least that his vices can be suppressed by fear, gave rise to the reception of the Athenian laws as having a deterrent effect on potential wrongdoers. In this light, the laws have a didactic nature, transforming the individuals for the benefit of the community. Athens, being a typical Greek polis, usually esteemed the public interest higher than the individual. The *oikoi* were gradually superseded by the polis, and the community developed yet another test for assessing the faithfulness of the citizens to common values. Punishment and acclaim educated the Athenian citizens; the underlying cause is a belief in the adaptable nature of humans.

The presence of character evidence from the Homeric period (Chapter 1) proves that such a broad invocation of ad hominem argumentation is not a phenomenon of classical Athens and has to be explained by reference to more general considerations. The Greek ideas of 'character' could be adduced to explain this phenomenon. These, in addition to the Greek ideas of 'personhood' which will be discussed in the next chapters, can offer a comprehensive underlying cause for the wide use of character evidence in Athenian courts and its endorsement by the structures and the personnel of the Athenian legal system.

Notes

1 The Sophistic movement which flourished especially in Athens (and other democratic cities, especially Syracuse) in the second half of the fifth century owes a lot to the philosophical and scientific discourses of the Presocratics. The employment of the art of rhetoric as a method of persuasion for their beliefs, but also as a mode of thinking, provided a ground for suspicion as to their trustworthiness and the justice of their causes, especially obvious in the writings of Plato. On the Sophists see Guthrie (1969).
2 Dover (1974), p. 88.
3 See Fortenbaugh (2007), pp. 58−60.
4 Lanni (2006), p. 60.
5 Lanni (2006), p. 62.
6 Lanni (2006), p. 62.
7 See Lanni (2006), p. 60 n. 92. Although Lanni refers to passages from orations, these are less than adequate for reaching such strong conclusions.

8 Dover (1974), p. 88.
9 Saunders (1991), p. 116.
10 *OED*, s.v. character.
11 Dennis (2010), p. 784.
12 Dennis (2010), p. 784.
13 To make things worse, as Dworkin (1986), p. 36 famously, though exaggeratedly, remarked about legal realists' approach: 'Some realists . . . said there is no such thing as law, or that law is only a matter of what the judge had for breakfast.' cf. Kozinski (1993).
14 Keane, (2010), p. 439.
15 Dennis (2010), p. 794.
16 *Winfield* (1939) 27 Cr. App. R. 139 at 141 (Humphreys J.); *Stirland v DPP* [1944] A.C. 315 at 326 (Viscount Simon L.C.).
17 McEwan (2007), p. 188 correctly warns against the cherry-picking and uncritical use of empirical evidence and experimental data. According to her, 'although the debate on the admissibility of the accused's bad character has been increasingly informed by empirical evidence, lawyers have, in typical fashion, managed to use the same research to support both sides of the argument'.
18 Davis (1991), p. 518.
19 Zuckerman (1987), p. 190.
20 Redmayne (2002), p. 684.
21 This historical review is taken from the objective parts of Redmayne (2002).
22 Caprara and Cervone (2008), pp. 64 and 110.
23 See Lacey (2001).
24 Wigmore (1983), par. 55 at 1151.
25 This is also the term used by the rhetoricians.
26 Liddell, Scott and Jones, s.v. *ἦθος*.
27 See Pind. *Nem*. 1.42; Hdt. 1.107, 3.36; Plat. *Phaedr*. 252D, 278D, *Laws* 655D; Aesch. *Prom*. 11, 309, *Agam*. 856; Ar. *Peac*. 350, 935. In the singular, it usually denotes 'character' in a more external and practical way: cf. Ar. *Plut*. 245, *Wasps* 1002, *Thesm*. 93.
28 See for example Hdt. 2.36; Thuc. *Hist*. 2.61, 6.18; cf. [Aesch.] *Prom*. 186. The commonest expression was *ἤθεά τε καὶ νόμους* referring to both morals and laws.
29 See for example Plat. *Meno* 95e (especially Theognis' fragment), 93a–94e; *Protag*. 327b–c; Eur. *El*. 369f.; more generally see Dover (1974), pp. 91–2.
30 Hereditary punishment was a not uncommon feature of Athenian law (e.g. in some forms of perpetual *atimia*, like the one referred to in Dem 9.42–5; cf. Hansen (1976), p. 119). By 'psychological rationale' I mean an honest belief in the hereditary nature of a disposition for wrongdoing, as one could implicitly infer by the wide invocation of family evidence in the orators. By 'practical rationale' I mean the twofold attempt of Athenian law to neutralise through punishment a hostile *oikos* as a whole, and to punish the descendants of a traitor in order to avoid their potential future vengeance. Both matters will be discussed in due course.
31 εἴη μή ποτέ μοι τοιοῦτον ἦθος, Ζεῦ πάτερ, ἀλλὰ κελεύθοις ἁπλόαις ζωᾶς ἐφαπτοίμαν, θανὼν ὡς παισὶ κλέος μὴ τὸ δύσφαμον προσάψω.
32 τὸ γὰρ ἐμφυὲς οὔτ' αἴθων ἀλώπηξ οὔτ' ἐρίβρομοι λέοντες διαλλάξαντο ἦθος.
33 The *Ajax* is believed to be written c. 450–430 BC, while the *Antigone* should be dated c. 441 BC.
34 Presumably, Plato would disagree with this approach. See for e.g. Plat. *Lach*. 201a–b: 'And if anyone makes fun of us for seeing fit to go to school at our time of life, I think we should appeal to Homer, who said that "shame is no good mate for a needy man."' 'So let us not mind what anyone may say, but join together in arranging for our own and the boys' tuition.' The quote (attributed to Socrates) 'κάλλιον οψιμαθής ή αμαθής' has become proverbial in Greece.

35 μή νυν ἓν ἦθος μοῦνον ἐν σαυτῷ φόρει, ὡς φὴς σύ, κοὐδὲν ἄλλο, τοῦτ᾽ ὀρθῶς ἔχειν. ὅστις γὰρ αὐτὸς ἢ φρονεῖν μόνος δοκεῖ, ἢ γλῶσσαν, ἣν οὐκ ἄλλος, ἢ ψυχὴν ἔχειν, οὗτοι διαπτυχθέντες ὤφθησαν κενοί.

36 εἴθε μοι εὐξαμένᾳ θεόθεν τάδε μοῖρα παράσχοι, τύχαν μετ᾽ ὄλβου καὶ ἀκήρατον ἄλγεσι θυμόν. δόξα δὲ μήτ᾽ ἀτρεκὴς μήτ᾽ αὖ παράσημος ἐνείη, ῥᾴδια δ᾽ ἤθεα τὸν αὔριον μεταβαλλομένα χρόνον αἰεὶ βίον συνευτυχοίην.

37 τὸ γὰρ τραφῆναι μὴ κακῶς αἰδῶ φέρει: αἰσχύνεται δὲ τἀγάθ᾽ ἀσκήσας ἀνὴρ κακὸς γενέσθαι πᾶς τις. ἡ δ᾽ εὐανδρία διδακτός, εἴπερ καὶ βρέφος διδάσκεται λέγειν ἀκούειν θ᾽ ὧν μάθησιν οὐκ ἔχει. ἃ δ᾽ ἂν μάθῃ τις, ταῦτα σῴζεσθαι φιλεῖ πρὸς γῆρας. οὕτω παῖδας εὖ παιδεύετε.

38 Cf. Ar. *Wasps* (1002): ἀλλ᾽ ὦ πολυτίμητοι θεοὶ ξύγγνωτέ μοι: ἄκων γὰρ αὖτ᾽ ἔδρασα κοὐ τοὐμοῦ τρόπου.

39 This poses yet another problem which will be especially revealed in our discussion of the forensic speeches. If character is stable but one chooses to act 'out of character', how and when could one recognise the true natural traits?

40 See for e.g. Ar. *Peace* 350, 935.

41 As Guthrie (1969, at p. 73) notes, quoting W.C. Greene (*Moira*, p. 251f.): 'most scholars would probably agree that the chief value of this composition (i.e. *Anonymous Iamblichi*) lies in showing "how far the stock ideas and arguments of the age penetrated into rather ordinary minds".'

42 In what follows, for the sake of convenience, I will treat the Sophists as exponents of a single intellectual movement, though I acknowledge that each one proposed his independent views, which were often radically different or even antithetical to the others'. For the 'Sophists' one should look at Guthrie (1969); Kerferd (1981); Rankin (1983). For a selective bibliography in English see McComiskey (1994).

43 See Gagarin (2002).

44 Guthrie (1969), p. 59.

45 The notion of *arête*, as well as the particular word (as in most other cases that formed the topics of Plato's dialogues) lacked a specific and adequate definition. (For different definitions see for example Pl. *Meno* 71e; *Gorg.* 492c.) Socrates' interlocutors insist on giving widely accepted examples of *arête* or putting forward popular beliefs, whose legitimacy is then questioned. However, as will be discussed in the next chapter, this very dialectical reflection, based on the questioning of common norms, forms the core of Platonic (and Greek) philosophy, as opposed to the individual, monastic philosophic reflection idealised in the Enlightenment. This has significant implications for the Greek ideas of personhood, as opposed to modern ones. See Gill (1996).

46 This formed a central topic of discussion at the end of the fifth century and beginning of the fourth. See for example the anonymous treatise *Dissoi Logoi* (Double Arguments).

47 Cf. Protag. fr. 3, DK: 'Teaching needs both nature and practice'. This comes close to Isocrates' thesis on the combination of natural ability and practice [see Isocr. *Antidosis* 186−92 and Arist. *Nic Eth.* 1103a].

48 The Greek word *πολιτισμός* comes much closer to my use of the word 'civilisation' here.

49 [Euripides] *Sisyphus*, fr. 25.1−8 DK (see ch.1, n. 5). Cf. Dem. 25.15.; Diod. Sic. 1.8.1−7.

50 Plat. *Rep*. 1.336bff.

51 Cf. Antiph. fr. 44 A, DK: 'justice consists in not transgressing the laws and usages (*νόμιμα*) of one's state. Therefore, the most profitable means to manipulate justice is to respect the laws when witnesses are present but otherwise to follow the precepts of nature.'

52 Although this is an idea expressed by Protagoras (Plat. *Prot*. 322d), it is not distinct from Plato's own (*Rep.* 410a).

53 Guthrie (1969), p. 68.

54 Cf. the rejection of Meno's popular definitions in 72a.

55 Plat. *Rep*. (2003) transl. by D. Lee, p. xliii.
56 Cf. Plat. *Phaedr*. 269D.
57 See for example Plat. *Lysis* 214c−d: 'What I believe they mean is that the good are like one another, and are friends, while the bad – as is also said of them – are never like even their own selves, being so ill-balanced and unsteady; and when a thing is unlike itself and variable it can hardly become like or friend to anything else.'
58 Cf. Plat. *Phaedr*. 250a.
59 Plat. *Phaedr*. 248e: 'Now in all these states, whoever lives justly obtains a better lot, and whoever lives unjustly, a worse.'
60 Plat. *Rep*, 401e.
61 Plat. *Phaedr*. 252c−d; 269d.
62 'δότε παράδειγμα τίνων ἤδη ἄλλων ἐπιμεληθέντες ἐκ φαύλων καλούς τε κἀγαθοὺς ἐποιήσατε'.
63 Plat. *Phaedr*. 254b−c.
64 Cf. Plat. *Rep*. 444d−e: 'ἀρετὴ μὲν ἄρα, ὡς ἔοικεν, ὑγίειά τέ τις ἂν εἴη καὶ κάλλος καὶ εὐεξία ψυχῆς, κακία δὲ νόσος τε καὶ αἶσχος καὶ ἀσθένεια . . . ἆρ' οὖν οὐ καὶ τὰ μὲν καλὰ ἐπιτηδεύματα εἰς ἀρετῆς κτῆσιν φέρει, τὰ δ' αἰσχρὰ εἰς κακίας;'.
65 Ibid. 254e: 'ὅταν δὲ ταὐτὸν πολλάκις πάσχων ὁ πονηρὸς τῆς ὕβρεως λήξῃ, ταπεινωθεὶς ἔπεται ἤδη τῇ τοῦ ἡνιόχου προνοίᾳ, καὶ ὅταν ἴδῃ τὸν καλόν, φόβῳ διόλλυται'.
66 Plato's belief in rehabilitation through punishment is expressed in the *Gorgias* (e.g. 478a, 517b), in the *Republic* (409), and in the *Laws* (e.g. 908e). Legal punishment for a diseased soul is compared to medical treatment for a diseased body. For discussion see Saunders (1991); Mackenzie (1981).
67 Pl. *Phaedr*. 256c.
68 Cf. Plat. *Lysis* 216e; 218a−b.
69 Dihle (1982), p. 55. Cf. p. 58: 'Aristotle also loosened the rigid interconnection between nature and human affairs which is typical of the main stream of Greek ethical thought. Only nature and its lasting order make it possible to know something objectively and to offer rational proof of that knowledge. In moral life objective knowledge can only refer to the nature of man, to the just, and to other entities that never occur as such in empirical life.'
70 Gill (1984), p. 164.
71 Cf. 1105b: 'Thus although actions are entitled just and temperate when they are such acts as just and temperate men would do, the agent is just and temperate not when he does these acts merely, but when he does them in the way in which just and temperate men do them. [5] It is correct therefore to say that a man becomes just by doing just actions and temperate by doing temperate actions; and no one can have the remotest chance of becoming good without doing them.'
72 Cf. 1114a: 'They acquire a particular quality by constantly acting in a particular way. This is shown by the way in which men train themselves for some contest or pursuit: they practice continually. Therefore only an utterly senseless person can fail to know that our characters are the result of our conduct.'
73 Cf. 1114a: 'Again, it is irrational to suppose that a man who acts unjustly does not wish to be unjust or a man who acts self-indulgently to be self-indulgent. But if without being ignorant a man does the things which will make him unjust, he will be unjust voluntarily.'
74 On *hamartia* see Bremer (1969); Stinton (1975); Sherman (1996).
75 Pakaluk (2005), p. 253: 'any sort of departure from correct conduct on account of some emotion even less similar to sensual desire is called "*akrasia*" in an even more remote and metaphorical sense.'
76 On *akrasia* see Rorty (1980); Pakaluk (2005), pp. 233−44.
77 Pakaluk (2005), p. 251.
78 Lys. 14.2.

79 Dem. 32.26; cf. 36.44. See also Dem. 25.15: 'The whole life of men, Athenians, whether they dwell in a large state or a small one, is governed by nature and by the laws. Of these, nature is something irregular and incalculable, and peculiar to each individual; but the laws are something universal, definite, and the same for all. Now nature, if it be evil, often chooses wrong, and that is why you will find men of an evil nature committing errors.'
80 Cf. Dem. 21.134: 'But if you did not do it and it was all a fabrication, and if the rest of the soldiers, instead of reproving the slanderers, chuckled over you, it only shows that from your general manner of life they thought that such a story exactly fitted you. It was yourself, then, that you ought to have kept more under control, instead of accusing the others.'
81 Aeschin. 3.78, 3.89, 3.163.
82 See Rehabilitation of Offenders Act 1974.
83 Lys. 26.5.
84 Lys. 14.30, 14.40.
85 Dem 21.186; cf. 45.63.
86 See for example Dem. 19.28, 101−2, 104, 111, 225−6, 311 etc.; Aeschin. 2.36,41, 51, 54, 122, 124 etc.
87 Lys. 1.1; cf. Andoc. 2.7; Antiph. 6.
88 The most characteristic example is to be found in Antiph. *Third Tetralogy*: 4.1.6; 4.3.2; 4.4.2; 4.4.6.
89 Andoc. 2.6−7.
90 Dem. 26.21−2; cf. 57.28.
91 E.g. Dem. 57.59.
92 Aeschin. 1.107; cf. Dem 25.60−2; 54.3.
93 See Aeschin. 1.28−32.
94 Aeschin. 1.29−30.
95 See analytical discussion in Ch. 2.
96 I only refer to the revelation of character traits and not to culpability. Even if less severely treated by Athenian law, involuntary perpetrators were still regarded as having absolute liability for their acts. Cf. Hansen (1976), p. 119.
97 Cf. Arist. *Rhet.* 1368b: 'Men act voluntarily when they know what they do, and do not act under compulsion. What is done voluntarily is not always done with premeditation; but what is done with premeditation is always known to the agent, for no one is ignorant of what he does with a purpose.'
98 Dem. 21.42−3; cf. 24.67; 57.45; cf. Arist. *Rhet*. 1416a.
99 Antiph. 3.3.1; cf. 3.3.9; cf. Dem. 29.22; 23.148; 59.58.
100 Lys. 26.5; cf. the argumentation in Lys. 7.27; 25.16.
101 'Drunkenness' could sometimes be cited as an aggravating factor, depending on the needs of a litigant's case. Cf. Dem. 19.196−9; 54.3−7; 54.16. Aristotle in the *Nic. Eth.* distinguishes between acting *through* ignorance from acting *in* ignorance (1110b), drunkenness causing the second and definitely being more blameworthy since it has to be attributed to one's choice; cf. 1113b, referring to an enactment of Pittacus by virtue of which 'drunkenness' doubled the penalty.
102 Cf. the Athenian law on wills (Dem. 46.14: 'Any citizen, with the exception of those who had been adopted when Solon entered upon his office, and had thereby become unable either to renounce or to claim an inheritance, shall have the right to dispose of his own property by will as he shall see fit, if he have no male children lawfully born, unless his mind be impaired by one of these things, lunacy or old age or drugs or disease, or unless he be under the influence of a woman, or under constraint or deprived of his liberty'; cf. Dem. 48.56.
103 Dem. 21.38−40, 180; for 'anger' cf. 21.41: 'For what sort of pretext, what decent and moderate excuse, can he show for his conduct? Anger? Possibly that will be his plea.

But whereas in cases where a sudden loss of self-control has impelled a man even to inflict a wanton insult, it is open to him to say that he has acted in anger; if, on the other hand, he is detected in a continuous course of law-breaking, spread over many days, surely this is far from a mere fit of anger and he stands convicted of a deliberate policy of insult.' *Pace* Aristotle's *Nic. Eth*. 1111a21 stating 'For it is probably a mistake to say that acts caused by anger or by desire are involuntary.'

104 Dem. 21.38, 74.

105 For Athenian 'punishment' one may consult Allen (2000); Todd (1993), pp. 139ff; Hall (1996); Hansen (1976); Saunders (1991); Cohen D. (2005). Relevant traces can be found in Mackenzie (1981).

106 Death sentences feature prominently in our sources, though the disproportionate number of high profile cases included in them renders that high percentage unlikely to reflect overall practice.

107 Cf. Mackenzie (1981), pp. 106ff.

108 Cf. Hansen (1976), pp. 118ff.

109 Hall (1996).

110 Deterrence of future misconduct was an extremely common pattern of argumentation in Athenian courts. See for example: Dem. 21.37, 220; 22.7; 23.94; 24.101; 25.17; 36.58; 42.15; 45.87; 50.66; 51.12; 54.43; 56.48; 59.113; cf. Arist. *Nic. Eth*. 1113b.

111 For a listing of (probable) *agones timetoi* see Harrison (1971), pp. 81–2.

112 See Ch. 2; cf. Carey (2004).

113 Todd (1990), p. 148 sees the direction of this approach as more useful than the opposite usually applied by modern scholars: 'In the study of the Athenian jury, the question has received considerably more attention, but from the opposite perspective. Instead of using the social values of the jury to examine the craft of the advocate, scholars have (of necessity) used the advocate to examine the jury.' The Athenian jury had 'a corporate identity and common values or attitudes' (p. 149) and 'the values and aspirations of Athenian citizens were a matter of consensus rather than of division' (p. 169).

References

ALLEN D. (2000), *The World of Prometheus*, Princeton, N.J.: Princeton University Press.

BREMER J.M. (1969), *Hamartia: Tragic Error in the Poetics of Aristotle and in Greek Tragedy*, Amsterdam: Adolf M. Hakkert.

CAPRARA G.V. and CERVONE D. (2008), *Personality: Determinants, Dynamics, and Potentials*, New York: Cambridge University Press.

CAREY C. (2004), 'Offence and Procedure in Athenian Law', in E.M. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, London: Duckworth.

COHEN D. (2005), 'Theories of Punishment', in M. Gagarin and D. Cohen (eds), *The Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press.

DAVIS S.M. (1991), 'Evidence of Character to Prove Conduct: A Reassessment of Relevancy', 27 *Crim. Law Bull*, 504.

DENNIS I.H. (2010), *The Law of Evidence* (fourth edn), London: Sweet & Maxwell.

DIHLE A. (1982), *The Theory of Will in Classical Antiquity* (Sather Classical Lectures), Berkeley/London: University of California Press.

DOVER K.J. (1974), *Greek Popular Morality in the Time of Plato and Aristotle*, Indianapolis; Cambridge: Hackett (1994), [Originally published: Oxford: Blackwell, c. 1974].

DWORKIN R. (1986), *Law's Empire*, London: Fontana.

FORTENBAUGH W. (2007), 'Biography and the Aristotlelian *Peripatos*', in M. Erler and S. Shorn (eds), *Die griechische Biographie in Hellenistischer Zeit. Akten des Internationalen Kongresses vom 26-29 Juli 2006 in Würzburg*, Berlin: De Gruyter.

GAGARIN M. (2002), *Antiphon the Athenian*, Austin, TX: University of Texas Press.

GILL C. (1984), 'The *Ethos/Pathos* Distinction in Rhetorical and Literary Criticism', *Classical Quarterly* 34 (i), 149−66.

——— (1996), *Personality in Greek Epic, Tragedy, and Philosophy: the Self in Dialogue*, Oxford: Clarendon Press.

GREENE W.C. (1944): *Moira: Fate, Good, and Evil in Greek Thought*, viii+450. Cambridge, MA: Harvard University Press (London: Milford).

GUTHRIE W.K.C. (1969) Vol. 3, *The Sophists*, Cambridge: Cambridge University Press.

HALL M.D. (1996), 'Even Dogs have Erinyes: Sanctions in Athenian Practice and Thinking', in L. Foxhall and A.D.E. Lewis (eds), *Greek Law in its Political Setting: Justifications not Justice*. Oxford: Clarendon Press.

HANSEN M.H. (1976), *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi, and Pheugontes: A Study in the Athenian Administration of Justice in the Fourth Century B.C.*, Odense: Odense University Press.

HARRISON A.R.W. (1968−72) *The Law in Athens* (2 Vols), Oxford: Clarendon Press.

KEANE A. (2010), *The Modern Law of Evidence* (8th ed.), New York: Oxford University Press.

KERFERD G.B. (1981), *The Sophistic Movement*, Cambridge: Cambridge University Press.

KOZINSKI A. (1993), 'What I Ate for Breakfast and Other Mysteries of Judicial Decision Making', 26 *Loy. L. A. L. Rev.* 993, (1992−3).

LACEY (2001), 'Responsibility and Modernity in Criminal Law', *The Journal of Political Philosophy*: Vol. 9, Number 3, 2001, 249−76.

LANNI A. (2006), *Law and Justice in the Courts of Classical Athens*, Cambridge: Cambridge University Press.

LIDDELL H.G., SCOTT R. and JONES H.S. (eds) (1996), *Greek-English Lexicon* (first edn 1843), Oxford: Clarendon Press.

MACKENZIE M.M. (1981), *Plato on Punishment*, Berkeley: University of California Press.

McCOMISKEY B. (1994), 'Sophistic Rhetoric and Philosophy: A Selective Bibliography in English since 1900', *Rhetoric Society Quarterly*, Vol. 24, 25−38.

McEWAN J. (2007), 'Reasoning, Relevance and Law Reform: the Influence of Empirical Research on Criminal Adjudication', in P. Roberts and M. Redmayne (eds), *Innovations in Evidence and Proof*, Oxford: Hart Publishing, 187−218.

PAKALUK M. (2005), *Aristotle's Nicomachean Ethics: an Introduction*, Cambridge, UK; New York: Cambridge University Press.

RANKIN H.D. (1983), *Sophists, Socratics and Cynics*, London: Barnes & Noble.

REDMAYNE M. (2002), 'The Relevance of Bad Character', [2002] *Cambridge Law Journal*, 684.

RORTY A.O. (1980), '*Akrasia* and Pleasure: Nicomachean Ethics Book 7', in A.O. Rorty (ed.), *Essays on Aristotle's Ethics*, Berkeley: University of California Press.

SAUNDERS T.J. (1991), *Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology*, Oxford: Clarendon.

SHERMAN N. (1996), 'Virtue and *Hamartia*', in A.O. Rorty (ed.), *Essays on Aristotle's Rhetoric*, Berkeley: University of California Press.

STINTON T.C.W. (1975), '*Hamartia* in Aristotle and Greek Tragedy', *Classical Quarterly* 25, 221−54.

TODD S.C. (1990), 'Lady Chatterley's Lover and the Attic Orators: The Social Composition of the Athenian Jury', *JHS* 110, 146−73.

——— (1993), *The Shape of Athenian Law*, Oxford: Clarendon Press.

WIGMORE J.H. (1983), *Evidence in Trials at Common Law* (Section 1−21 Volume I), Boston: Toronto: Little Brown & Co Law & Business.

ZUCKERMAN A.A.S. (1987), 'Similar Fact Evidence – The Unobservable Rule', 103 *L.Q.R.*, 187.

4 Methods of providing evidence from character in Athenian courts

This chapter examines the methods and tactics by which character evidence was adduced in the courts of classical Athens. This subject relates to deeper issues of Athenian life. As has already been argued in the previous chapter, the Athenian ideas of 'human character' directly influenced the tactics they used in their courts. Furthermore, the newly developed disciplines of rhetoric, dialectic and logic, also played a major part in shaping the methods of argumentation. For instance, the combination of the inductive way of reasoning, supported by the undecided questions regarding the stability of a person's character (which in more sophisticated circles gradually gave way to a belief in the changeable nature of character), forced litigants to use a series of past examples and actions in order to deduce a certain character trait. Apart from these issues, the more practical side of rhetoric will be examined, discussing devices and tricks employed by orators in order to obscure an opponent's *ethos* or to hide weaknesses in their own case. In the course of the chapter, the approach of modern courts will be discussed in offering a comparative perspective.

Chapter 3 has investigated the Greek assumptions about 'character', with the assurance that many of them would illuminate the patterns through which a person's *ethos* was revealed in Athenian courts. However, the fact that these assumptions were not fixed and constantly evolved produced a flexible approach to providing character evidence. The absence of durable presuppositions regarding the stability or changeability of human character and the ways that this may be proved meant that, in the agonistic setting of Athenian courts, weak presumptions would inevitably be questioned and manipulated. As a result, adding to the extensive use of character evidence, numerous tactics were adduced in order to expose a person's *ethos*. General reputation, previous offences, reprehensible past acts, as well as more innovative rhetorical techniques such as negative comparisons and allegories, make up the list of how Athenian litigants could present character.

This flexibility of choices has led many scholars, consciously or subconsciously insisting on an idealistic view of current practices, to focus on the dissimilarities of the Athenian legal system to modern ones, and highlight its remoteness.[1] Yet, even if this comparison is taken as valid, the conclusion may not be so exact. Current law of evidence admits that a person's character may be inferred from evidence

of general disposition, from evidence of specific examples of his conduct on other occasions (including, in the case of bad conduct, evidence of his previous convictions), or from evidence of his reputation among those to whom he is known.[2] Some scholars include even the simple exercise of a particularly ill-regarded calling[3] or neutral character testimony in the form of statements such as 'I have never heard anything ill of the defendant's character',[4] while others suggest the further relaxation of admissibility rules.[5] As will be shown, similar methods of argumentation are not absent from Athenian courtrooms.

Additionally, current legal trends progress towards a wider and more flexible approach to character evidence. Under common law, only reputation[6] (and not specific events) is admitted and evidence should relate to a time proximate to that of the offences charged.[7] This traditional exclusion of references to specific past acts is relaxed and the defendant himself may adduce such evidence.[8] The Criminal Justice Act 2003 relaxes the rules of admissibility by promoting a more flexible approach, acknowledging the probative force of evidence from previous behaviour and misconduct. This confirms that the intent of the UK parliament in passing the 2003 Act was to facilitate the admission of evidence concerning an accused's bad character. Accordingly, prosecutors ought to be entitled to invoke the defendant's entire discreditable past, and not simply their previous convictions.[9] The CJA 2003 goes so far as to include the appearance or dress of a defendant in its classification of 'conduct',[10] although this is merely reserved for the correction of any false impression already given by the party in question. A gradual shift is apparent.

Leaving aside the absence of a solid set of Athenian beliefs about 'character', some of the previous conclusions will be recalled, setting the framework for the forthcoming discussion. These form the ideological context and explain the presence and relevance of the (more or less familiar) methods of character invocation in Athenian courts. The emergence of the polis reflected the need for a simultaneous emergence of cooperative values to replace (or sometimes supplement) the archaic agonistic ones. These values, necessary for communal and peaceful living, marked the essence of coexistence in the civilised polis as opposed to the unrestrained past. The (natural or not) human tendency for barbarity needed to be altered, tamed, and adapted to the new reality. Transformation of human nature presupposed the transformation of *ethos*, in the sense of promoting the cooperative virtues and suppressing the self-seeking vices. This new kind of 'polis-behaviour' demanded unqualified adherence to communal laws and ethical norms. When arguing in an Athenian court, this had to be proved in practice, by reference both to the litigant's particular acts and to general behaviour. A multitude of such acts should be presented in order to prove consistent and wholehearted devotion to the communal life of the polis.

In the absence of a firm belief in the stability of character, the difficulty of proving a fixed positive character was surpassed by the invocation of (numerous or particularly appealing) previous virtuous deeds. Prolonged positive conduct, free from blemishes, was required to prove the person's dispositional kindness. The absence of a belief in a person's freedom of choice in every single instance of his

life meant that any past reprehensible acts could be taken as the exposition of true *ethos*, as opposed to the opportunistic, hypocritical, superficially virtuous conduct. The classification of character traits (either virtues or vices) in broad, general categories, supported by an inductive mode of reasoning, meant that individual reprehensible acts could be used in order to categorise the person in question as possessing the relevant character defect. Consequently, such a person could be blamed as capable of performing *any* reprehensible act attributable to that particular flaw.

Court argumentation was adjusted in order to comply with these prevalent ideas. The rule to be followed by all the orators was to provide evidence from a person's past life through the invocation of many past acts, these being especially relevant to the particular character trait highlighted by the legal charge. Subsequently, crude characterisation in the form of direct insults or innuendoes was the rhetorical culmination which simply emphasised the conclusions of the aforementioned argumentation. Furthermore, reference to the general or specific reputation (among the whole polis or the immediate circle, referring either to general character or to specific traits) allowed for conclusions by deduction, establishing guilt or innocence, credibility, worthiness or baseness. Following Aristotle's remarks, character could be portrayed at the time of the trial, either through the *logoi* of the speaker or through the mode of delivery. In what follows, specific examples from Athenian court speeches will be used to illustrate the aforesaid points.

Evidence from the past

Reference to *past acts* was the prevalent method of argumentation in the Athenian courts. Although the norm demanded such references to be supported by witnesses, nonetheless in the absence of direct evidence and testimonies, jurors had to rely on circumstantial evidence or arguments from probability. A person's character traits could be extracted through inductive reasoning, by reference to his past acts. Irrelevant at first glance, such reference illuminated a litigant's tendency to behave in particular reprehensible ways which, when applied to the circumstances of the case, would assist the jurors in reaching a decision about the likelihood of innocence or guilt. For instance, if the charge was relevant to a specific character defect (e.g. indecency, corruption, antisocial behaviour etc.) instances of past conduct revealing the existence of such a flaw would be received by the court as relevant.

To make it plain, an example taken from Aeschines' argumentation against Timarchus during a *dokimasia rhetoron* can be offered. The main charge focused on the prostitution of Timarchus and (less) on the squandering of his patrimony. Aeschines refers to specific incidents from Timarchus' past life in order to prove his breach of the law. First, specific acts are cited which refer to the main charge in question. He enumerates the houses of older, indecent men in which he has been kept (1.40, 43, 52−3, 57 etc.) and the episodes of squandering his family estate (1.97−102).

Nevertheless, if this unwitnessed case is going to seem probable, Aeschines had to offer a plausible answer as to what led Timarchus to resort to this kind of behaviour. Second, in anticipation of the defence's arguments, Aeschines had to prove that the acquisition and squandering of such a significant property was not inconsistent with the sale of his body for money. Aeschines addresses both matters by a single, powerful argument: Timarchus' character, gluttonous and excessive, made him an unrestrained victim of pleasures. How was this to be proved? By reference to his previous (seemingly irrelevant) conduct. Timarchus was 'slave to the most disgraceful pleasures, gluttony and expensive eating and flute-girls and courtesans and dice and the other activities that should never have control of a decent and freeborn man' (1.42). His only care was to find a rich *choregos* (1.54) in order to continue this way of life, spending his time at the gaming house (1.53) and financing his extravagant tastes (1.65, 94−5). His unrestrained nature (abstracted by the above examples) is also revealed by the violent and unprecedented way he and his company treated his former 'owner' (1.59). A series of past acts, either central to the main charge or marginal, may by induction reveal specific character traits which, in turn, will serve as the catalyst in increasing the likelihood of the opponent's criminal behaviour.

This proves two main points. First, character evidence was relevant and essential in arguing and proving a legal case. Without this mastery in the characterisation of Timarchus, Aeschines would probably have had less success than he achieved in this unwitnessed case. The portrayal of the personality of Timarchus adds to the plausibility of Aeschines' presentation of the facts and the probability of Timarchus' guilt. Subsequently, jurors could apply the law to the true facts as they perceived them. Second, the inductive way of reasoning and the belief in general categories of character traits authorised the method and content of argumentation in Athenian courts. In the light of these Athenian ideas, reference to past events, which on the surface seem haphazard and irrelevant to the legal case, could indeed prove decisive to the legal case. Gluttony, drunken violence, extravagant spending and gambling, may at first glance seem unconnected, especially if adduced in a case of male prostitution. Nevertheless, they all spring from a general character trait: excess. Timarchus' unrestrained nature was the cause and the end of all his deeds. His character got him into a circle of evil from which he could not escape. What was left was the financing of his indecent pleasures; to achieve this, again, he did not stop at anything. He sold his body in an analogous way to his squandering of his patrimony. He devoured his inheritance in the same manner as he embezzled public property (1.106−16). This is Timarchus' character and these are his past deeds that prove it.[11] He is unworthy of sharing rights with the rest of the Athenian citizens, hence he should be convicted.

The same conclusion may be deduced from the speech of Lycurgus against Leocrates. The latter's breach of a decree forbidding people to flee from Athens after the disaster of Chaeronea, was the point of the legal charge. Lycurgus, the decent patriot, claims that Leocrates left Athens out of cowardice and infidelity. Leocrates claims that he left Athens for trade. How can Lycurgus prove his assertion? By reference to Leocrates' disloyal character which sheds light on the single

act of fleeing Athens. His past acts prove his unpatriotic stance but also reveal its underlying causes. Leocrates was ungrateful, incapable of having emotional ties and intimacy to his country, his ancestors and his dearest. His conduct, as shown in his defamation of Athens to the people of Rhodes (1.18), had been firmly opposed to that of the venerable ancestors (1.14). After that, he stayed at Megara, unashamed of being 'an alien on the borders of the land that nurtured him' (1.21). He did not even stop short of uprooting the 'ancestral images' and conveying his property (1.25). He also broke the law (a point which is not under consideration in the current plaint, but indicative of his disloyal and traitorous character) in transporting corn to places other than Athens. The above considerations illuminate the unacceptable motive of Leocrates' treacherous acts the night he fled Athens. They support Lycurgus' allegations that, due to his character, 'no city let him reside within it as an alien' (1.133–4). Leocrates' betrayal was total: against his country (1.18, 26, 45), his ancestors (1.25), and the gods (1.26, 76). All his past deeds have been performed out of deliberate choice and prove the ungrateful inclination of his character. Even non-citizens who have not been nurtured by the Athenian soil did not show such hatred and ingratitude against the city (1.39); Leocrates did. Such disloyal men are bad, whether as citizens, guests or personal friends. For they will enjoy the advantages offered but will not reciprocate the favour in times of difficulty (1.133). His more general character trait has been proved, leaving no question as to the motives behind his flight.

More examples may be offered to prove that a litigant's past acts, followed by an inductive method of reasoning, reveal a key character trait which illuminates the facts of the case and prove the speaker's crucial points. In Lysias 1, reference to the background of the case portrays Euphiletus as the naïve husband, who was slow to understand and incapable of plotting the alleged trap against Eratosthenes.[12] It is particularly important that this case was probably presented before the *ephetai* at the Delphinion, the jurors being experts and probably abiding to strict rules against irrelevant argumentation as in their original post, the court of the Areopagus.[13] In Lysias 3, the whole context of the dispute, as revealed by reference to numerous past acts, portrays the character of both parties. The jury is not invited to give a verdict based on equity by taking into account the whole story. Nor was the background of the dispute presented to help the jurors reach an ad hoc verdict by reference to the particularities of the case. Conversely, they are invited to give a verdict on the specific allegation of wounding with premeditation, in the light of both litigants' attitudes. The speaker's (defendant's) temperance and the prosecutor's violent and hubristic character make it highly improbable that the first was responsible for the brawl.[14] It is of utmost importance to note here that this case was heard by the court of Areopagus, the stricter institution as far as its leniency to extra-legal argumentation is concerned.

In Lysias 32, a *dike epitropes* (a suit for impropriety in the conduct of the position of guardian) makes reference to a multitude of Diogeiton's past acts, highlighting his dispositional deceitfulness.[15] Hypereides in *Against Athenogenes* portrays yet another deceitful character, who (jurors are emphatically informed) is an Egyptian (Hyp. 3.3). His past conduct proves that he is fraudulent, ungrateful

and disrespectful, characteristics which make him a probable candidate for committing the alleged fraud against the speaker. He escaped from Athens after Chaeronea (3.29) (betraying the agreement with the laws of the state which welcomed him). Also, he betrayed his second host country, Troezen (3.29ff.) (changing his position, not his disposition), and he maltreated his kin (3.35). Likewise, being meddlesome and a speechwriter, Athenogenes and his equally deceitful mistress (3.2: the most gifted courtesan of her time) were too cunning for a quiet farmer such as the speaker (3.26).

In the light of the above discussion, the scholarly attempt to use litigants' remotely relevant references to the background of the dispute in justification of the thesis[16] that these were adduced in order to aid the jurors in reaching an ad hoc, just verdict based on the particular circumstances of the case may be questioned. According to them, Athenian courts were less concerned with the legal case at hand and extended their perspective in order to embrace the whole context of the relations between the parties. By this token, verdicts were not founded on an application of the law to the particular charge of the written plaint, but on equitable justifications (such as fairness) and cases were decided on an ad hoc basis. However, as has already been shown, the context and background of disputes (or even references entirely unrelated to the particular dispute under examination) were in concord with the Athenian ideas of character and the ways in which these could be adduced. Such references served as circumstantial proofs, increasing the probability of a litigant's description of events in the quest for the establishment of the factual truth.

Lanni, in order to support her aforementioned thesis, refers to two cases which undoubtedly suit her aim. The first case is Dem. 53 (*Against Nicostratus*), arising from an *apographe* (writ of confiscation for a state debtor). Lanni focuses exceedingly on the fifteen paragraphs in which Apollodorus explains to the jurors the background of the dispute. Apollodorus' respect for *philia* and his generous behaviour towards Nicostratus are contrasted with the latter's ingratitude and vicious plotting against him. What Lanni nevertheless fails to mention is that from the proem, the prosecutor is noticeably worried about an allegation of bringing a malicious prosecution. Such a counter-accusation was relevant in all public suits (where *ho boulomenos* could initiate proceedings), let alone in cases of *apographe* (which involved financial profit for the prosecutor). Second, although the speech is indeed divided into two equal parts (the first refers to the hostile relations between the parties which triggered Apollodorus' decision to indict, the second to the merits of the case), when the speech was actually delivered in court, the first part consisted solely of narrative (with a minor detour at its end when Apollodorus calls witnesses), whereas in the second part (the proof of the plaint's point) Apollodorus called witnesses five times, for every single point he mentioned. Therefore, the emphasis and the practical balance of the speech concentrated overwhelmingly on the proof of the main charge.

The second case Lanni cites is Dem. 47, a case of false witnessing. The original case that triggered the *dike pseudomarturion* was a *dike aikeias* (assault), won by Theophemus against the speaker. The latter then accused Theophemus' brother

and brother-in-law of giving false witness on a key issue. The witnesses had testified that Theophemus offered an eyewitness slave woman for torture, an offer that the speaker refused. In the surviving speech, the prosecutor moves on three axes: i) direct proof that the witnesses lied and that *he* in fact asked for the slave's testimony, which Theophemus cunningly avoided (47.4−18), ii) reference to the incidents leading to the fight generating the original trial (47.19−48), and iii) reference to the incidents after the original trial and before the current *dike pseudomarturion* (47.49ff.). The first axis needs no justification for it is directly related to the case. The aim of the second is to prove by circumstantial evidence that the slave would in fact testify that it was Theophemus (and not the speaker) who delivered the first blow (i.e. against Theophemus and for the speaker). Thus Theophemus, by the failure to have the eyewitness testifying, gained a crucial advantage. Accordingly, it is illogical to believe that Theophemus had asked for the slave to testify, whereas the speaker denied it. As a result, the witnesses lied. Consequently, this part is equally relevant to the case in question, rather than an attempt to contextualise the dispute. The final axis refers to violent incidents on the part of Theophemus who, being at an advantage after the verdict of the original trial, plotted against the speaker in order to compel him to drop the current *dike pseudomarturion.* Therefore, the whole speech, with the detailed references to the background of the dispute, is logically coherent and relevant to the case at hand, carefully aiming (using divergent tactics) at proving the main point: false witnessing. Also, the coherence of argumentation was promoted by the opponents' character presentation which formed a link between the three aforementioned axes. Examined in this light, the speaker's reference to a multitude of past acts performed by the parties (and to depositions of men who suffered from his opponents in the past) is designed to portray both litigants' characters, rendering probable the fact that the malicious, violent and hubristic Theophemus delivered the first blow against the reasonable, moderate and lawful speaker.[17]

Lastly, Lanni refers to inheritance cases and argues that speakers resort to argumentation from equity, advertising their affinity to the deceased against the formal document of the will. However, such cases are *sui generis* since the trial ceases to be adversarial and all claimants have equal claims. References to closeness aim to question the validity of the presented document, at a time when the means for testing it largely relied on circumstantial evidence and probability. Regardless of the special nature of inheritance disputes, Lanni's conclusions have to be tested by reference to a wider perspective and more general considerations.[18] All cases Lanni refers to (inheritance cases, *apographai* and *dikai pseudomarturion*) provoke similar arguments, highlighting the atypical nature of these procedures. During the former, the state was deemed to be the main interested party, with the prosecutor acting as its agent. The fact that in such a public case the initiator of the charge would gain material benefit rendered him suspect of sycophancy. His character (portrayed by reference to past acts) or a valid motive (such as enmity against the opponent, again demonstrated by past incidents) acted as a bulwark against such allegations. As far as the *dikai pseudomarturion* are concerned, these formed an attempt on the part of the losing party to reopen and reargue the original case

(cf. Dem. 47.46). Nevertheless, as has been proved, even in such cases litigants were largely committed to illuminating the main issues of the case, their argumentation being relevant and 'to the point'.

To conclude then, as Aristotle emphasised, reference to a multitude of deliberately chosen past acts could inductively prove a more general character trait. Correspondingly, the character trait in question could, by deduction, illuminate the hidden or disputed facts of the case that formed the essence of the legal charge. In cases where the existence of stereotypical beliefs was strong as to a particular characteristic of a litigant, reference to past acts was welcome, but not necessary. For instance, following a deductive method of reasoning, the mere fact of being an Egyptian (Hyp. 3) or a Phaselite (Dem. 35) could automatically allow for a presumption of certain particular characteristics such as dishonesty and fraudulence, with the same ease that hubris and intemperance could be deducted from being young.[19] In addition to other methods of proof such as direct evidence and witness testimonies, arguments from probability, supported by circumstantial evidence, contributed to the efforts of Athenian jurors to reach decisions in accordance with their oath. The Athenian beliefs about character, supported by their mode of reasoning, extended the ways by which character could be adduced and rendered relevant any reference to seemingly remote or unrelated past acts.

Reputation and associates

In everyday dealings, character and personality are closely connected with reputation. Both are determined by the perceptions of a person's social circle, with reputation resulting from the opinions of people witnessing his behaviour. Furthermore, reputation is yet another distinctive feature of an individual, and it may be adduced in courts as evidence for a party's ethical standing. Public estimation of someone may prove decisive in a legal case, especially in a forensic setting such as in Athens and in a culture placing more emphasis on questions of honour and shame.[20] In what follows, the importance of a person's reputation (either among the general public or his immediate social circle), its effect to the argumentation in Athenian courts, and the ways by which it was adduced will be investigated.

Having a comparative perspective would be useful in better understanding the importance of reputation and the Athenian practice. Modern law of evidence in the United Kingdom provides that

> the character of a person may be proved by evidence of general disposition, by evidence of specific examples of his conduct on other occasions (including, in the case of bad conduct, evidence of his previous convictions), or by evidence of his reputation among those to whom he is known.[21]

Under common law, reputation alone[22] but not specific events, was admitted. This is at present relaxed and the defendant himself may adduce evidence of

particular acts.[23] In the United States, the Federal Rules of Evidence (405, 608) provide for the use of reputation as an acknowledged method of proving character. When character is used circumstantially, proof may be only by reputation and opinion, prohibiting the most convincing (but more prejudicial) method of providing specific instances of past conduct. In both these jurisdictions, the importance of evidence from the reputation of the parties is retained.

In classical Athens, both a (probably well-known) person's general reputation and the opinions of his immediate social environment could be put forward following different methods. A possible way was through the testimonies of witnesses. Nevertheless, the partisanship of these witnesses[24] who belonged to the circle of litigants meant that their quality and credibility determined the effect of their testimony.[25] Moreover, reference to a litigant's associates could be made as they could also influence his reputation. Character evidence given about a third party close to the litigant had a profound impact on the latter's reputation. This flexible and all-inclusive approach elevated the issue of reputation to a prominent place, having both probative and rhetorical significance. Strategically, reputation could be used to reveal the relevant character traits of litigants. Tactically, it could serve as a rhetorical *topos* leaving to the audience the impression that they already knew and adhered to the arguments of the speaker.

All these are best exemplified in the case of Aeschines against Timarchus.[26] Aeschines' difficulty in finding witnesses to testify against the defendant could seriously undermine the proof of his case. In his effort to explain and justify this difficulty (Aes. 1.44−8, 71−3, 160−4) he seeks to downplay the importance of direct testimonies and replace them with an equally probative common report.[27] The fact that Timarchus was already a well-known figure among Athenians assisted the orator in presenting his character, though complete certainty is impossible as to the accuracy of his comments.[28] Timarchus' reputation is blackened to a great extent, with Aeschines provoking the agreement of the audience[29] – in this way he sought to transform the jurors to partisan witnesses, confirming Aeschines' assertions.[30] Common report and reputation have acted as the connective elements which put Aeschines and the jurors on the same side: standing in agreement as to Timarchus' guilt, his reputation formed the catalyst for his conviction.[31] Such a verdict would not be unjust if indeed the defendant was notorious for precisely the kind of conduct both directly relevant to the legal case and sufficient to condemn him.[32] After all reputation was the fair product of a man's past acts, being as credible as witnesses' testimonies given at the time of the trial.[33]

On the other hand, Timarchus (and offended litigants in general) could dispute the accuracy of such reports and dismiss them as common slander. Aeschines, in anticipation, refers to the deification of Common Report, presenting as evidence for its unerring testimony quotations from poetry.[34] Demosthenes, Timarchus' supporting speaker and main disputant of Aeschines' assertions as slanderous and inaccurate (Aeschin. 1.125), would use the same kind of argumentation when it best suited his interests.[35] Aeschines himself, when confronted with negative arguments about his own reputation would dismiss them as inaccurate violations of the truth (Aeschin. 2.153). Other orators too used general reputation as a means of

presenting the character of the parties, presumably those that were already recognisable among the Athenians.[36] In cases, therefore, where the (relevant to the legal case) past conduct of the parties acquired the status of common report throughout the polis, it could indeed prove a powerful weapon in a litigant's arsenal, sufficient to disturb the equilibrium of a case (cf. Dem 52.1−2).

Closer to modern perceptions of character evidence in the form of reputation are the occasions when witnesses with direct knowledge of the events provided evidence for the character of the parties. However, the similarities do not exceed the differences. Litigants continue to play a prominent role since they themselves testify about their own (or the other party's) conduct, merely providing witnesses for confirmation of their story. Furthermore, witnesses testified exclusively on questions of fact, leaving the issue of character to be illustrated only as a side-issue. For instance, Timarchus' characterisation as immoral and indecent was confirmed by his immediate circle's knowledge or testimonies concerning his licentious acts.[37] Lysias' use of witnesses also focuses on their direct knowledge of facts, although they not infrequently shed light on the character and moral uprightness of the parties too.[38] Direct or indirect testimonies could also have rhetorical use since, by placing witnesses in the position of praising a litigant, envy or jealousy could be avoided.[39]

As becomes evident from a close inspection of witness testimonies, these had direct bearing on the case, shedding light on the most relevant issues. The reading of depositions meant the stoppage of the time allotted to the speaker; this could nonetheless damage the flow of his speech or incite an audience's unease. Thus orators were very careful as to the moments that they allotted to witnesses and the importance of the facts the latter were called to confirm. Noteworthy is the limited characterisation of witnesses in Athenian courts.[40] The inviolability of witnesses' credibility in practice is evident as demonstrated by the rare attempts at character assassination against them. This may be explained by reference to the Athenian procedures against false witnessing, which in this respect promoted a substantive rather than rhetorical attack against perjurers. On the other hand, supporting speakers did not enjoy such 'immunity', their characters and credibility being as much a target as those of the main opponent.[41]

Apart from the direct characterisation of the parties achieved by the testimonies of those having immediate knowledge of the facts, an indirect means of character portrayal could also emerge from the immediate circle. The character of a man resembled the character of his associates, so linking a litigant with reputable or wicked men illuminated his own traits. Aeschines continually links Timarchus with the most disreputable men of Athens, who were notorious for exactly the kind of indecent behaviour with which he charged him.[42] He uses the authority of Euripides in order to prove that 'the man is such as is the company he loves to keep'.[43] As a matter of fact, this was a widely held opinion[44] provoking extensive reference to a litigant's associates in order to illuminate his character. The same strategy was followed by both Aeschines and Demosthenes in the course of their famous clashes, trying to associate their opponent with the convicted fugitive Philocrates.[45] Fifty years earlier Lysias used the same method to prove the affinity

of Eratosthenes with Theramenes,[46] whose character is portrayed in the most negative manner. More examples could be offered that demonstrate the existence of this rhetorical pattern.[47]

Finally, character portrayal of a third party, in addition to witnesses, associates, and supporting speakers, could refer to deceased persons. Whenever relevant, litigants proceeded to such characterisation in order to prove important points of their argumentation. To demonstrate this, reference to the character of the murdered Eratosthenes (Lysias 1) may be made, as presented by the defendant (Euphiletus) in a charge of intentional homicide. The facts of the case are well-known, with the legal charge focusing on the lawfulness of Euphiletus' killing of his wife's lover. Athenian law, for the protection of the sanctity of *oikos* and the integrity of the citizen body, provided that a citizen could kill on the spot the seducer of any female family member who fell under his protection. However, Eratosthenes' kin alleged that the victim was tricked and fell into a well organised trap which Euphiletus prepared in order to kill him with impunity. Euphiletus, in order to prove that the deceased had in fact seduced his wife, presents the victim as a serial corruptor of women, highlighting his propensity for such conduct by reference to analogous episodes from the past.[48] In Lysias 19, the case concerned the confiscation of the deceased Aristophanes' property. The property was confiscated but its value did not meet popular expectations. As a result, suspicion arose that some of his relatives had concealed a substantial part. In harmony with the defence strategy of minimising the scale of Aristophanes' wealth, the speaker presents him as a spendthrift, whose extravagance and expenditure to achieve social recognition substantially reduced his collected wealth.[49] In Lysias 13, a trial against Agoratus (alleged informer of the Thirty), the speaker insists that the jury should punish the defendant and take vengeance for the murders for which he should be held responsible. The deceased men were virtuous and respectable patriots, loyal to the democracy.[50] The latter characteristic especially induced Agoratus to inform against them, rendering him a collaborator of the Thirty. To conclude then, when litigants resorted to argumentation from character concerning deceased persons, this was directly relevant to the case, illuminating decisive issues.

Delivery (*hypokrisis*) and presentation

A very important method of presenting character in Athenian courts is *hypokrisis*. The issue of dramatic presentation and delivery in the ancient courts may indeed change the way of analysis and interpretation of Athenian orations. According to Aristotle (*Rhet*. 1403bff.), this topic had not been treated systematically before his own time; only lately had it come to notice and, after all, it was – rightly – considered vulgar. Aristotle's negative attitude towards delivery[51] (once again attributing its presence to the inadequacy of the audience) has been explained by reference to Platonic influence on him.[52] Nevertheless, he briefly touched upon the matter, admittedly without devoting too much attention to it, considering it necessary as a useful means of influencing an audience. The gap in systematic treatment would

be filled by Theophrastus in the next generation, with his now lost work *On Style*.[53] On the other hand, Roman writers considered delivery of utmost importance. For Cicero

> [D]elivery alone is supreme. In speaking: without it the greatest orator cannot be of any account, and a moderate speaker who is trained in this field can often defeat his superiors.[54]

In this, ancient theorists are at one with modern research, demonstrating the importance of divergent techniques, with delivery and presentation supporting verbal communication.[55]

The alleged theatricality of litigants is a matter of controversy among researchers. According to one view, the (original) orations were, in a very real sense, performance texts, punctuated with entrances and exits, marked for the display of laws and contracts, witnesses and suppliants, and not infrequently, the speaker's own theatrical gesture. Accordingly, the creation of *ethos* is the staging of a recognisable persona, portrayed by the live performances of the litigants.[56] By the same token, concentrating on the similarities between public performances in forensic environments and in the theatre,[57] law court speeches can be seen as essentially 'dramatic', where orators share the same challenges with actors and use similar performance techniques. The process of self-dramatisation through delivery meant that the speaker had to proceed through different, upward stages. Memorising the speech, rehearsing a convincing rhetorical 'performance' in advance, and creating a (seemingly spontaneous) likeable persona were necessary to convince an experienced and exacting audience. This process of dramatic characterisation through the enactment of a vivid and consistent character, attained through the careful balance between speech and action, was significant in the context of a court which based its decisions on circumstantial evidence and probability. Actually, delivery itself formed an implied argument from probability, suggesting that the character before the jury is incapable of behaving in the manner alleged.[58]

The other trend in scholarship acknowledges the potentiality of such dramatic action by Athenian litigants, though questioning its extent and eventual success. Excessive theatricality and tones could damage a litigant's case, provoking negative responses from the audience. Skilled speakers and professional logographers were definitely aware of this, preferring a balanced, *un*theatrical mode of delivery. Moreover, careful examination of the tone of the rhetoric of the orations (especially of highly emotional passages such as appeals to pity) suggests that the 'fundamental intent of these appeals as they are composed by professionals is compatible with a dignified delivery'.[59] Regardless of whether *idiotai* consciously or unconsciously resorted to theatrical delivery or imitation of tragic style, the slim evidence provided by the Attic orators hinders the extraction of any strong conclusions.

Indeed, to my knowledge, there is only one passage explicitly referring to such a theatrical mode of delivery in court, Dem. 19.252.[60] This is alleged to have been performed by the ex-actor Aeschines in a period when character presentation

through the speaker's skilful delivery had begun to be appreciated. Other researchers extract more examples of rhetorical 'action' from the wording of the speeches, though uncertainty persists as to the exactness of these remarks.[61] On the contrary, taking as valid Aristotle's observation that delivery is a matter of *voice* (*Rhet.* 1403b26),[62] direct references and examples can be found in the later orations, especially by Demosthenes. This may be yet another clue indicating the rising importance of vocal delivery over time, but also a hint that vocal and not acting skills were still valued the most. Also, in the *Nicomachean Ethics*, the Stagirite claims that voice is an important medium for conveying character.[63]

The importance of voice is demonstrated in stories reaching us from antiquity. The appreciation of vocal skills is exemplified in the person of Isocrates who actually refrained from public speaking due to a natural deficiency in his voice (Isoc. 5.81; 12.10). Many and famous are the anecdotes that reach us about Demosthenes' vocal training.[64] The Homeric origins of this appraisal of voice seem to be restricted to volume and malleability, which could support or advance the eloquence of a speaker.[65] Over time, the stories circulated about Pythagoras[66] uncover the total advancement of speech to a new dimension:

> Dispensing with appearances altogether and occulting himself from his pupil audiences, he appeared to them in a disembodied form, as a pure voice. His pupils, reduced to silence, were given over to an utter absorption of their master's voice . . . it was Pythagoras, not his Homeric predecessors, who revealed the logic of the voice by which rhetoric works (and had always worked) its magic.[67]

Voice as an aesthetic phenomenon in its own right was capable of moving a mass audience, which in turn learnt to appreciate it as the rhetorical manifestation of a performance culture.

This is best illustrated by reference to Demosthenes' anxiety to diminish and ridicule the impact of the well-trained actor's (Aeschines') voice during their contests. Demosthenes' own natural vocal insufficiency must certainly have played a role, since the direct comparison between the two would be inescapable.[68] Nevertheless Demosthenes, through the interplay of preaching and mockery,[69] tried to cancel out his deficiency and induce the jurors to disregard (or even despise) Aeschines' rhetorical ability. It is not vocal talent that really matters when it comes to serious considerations. Demosthenes' appointment for the delivery of the Funeral Speech (despite Aeschines' great voice) proves the point (Dem. 18.285). Patriotism requires wholehearted devotion to the homeland, sharing its joys and misfortunes. Therefore, 'the chosen speaker should not lament their fate with the feigning voice of an actor, but express the mourning of his very soul' (Dem. 18.287). Natural gifts should be used in the service of the fatherland, leaving aside inessential petty demonstrations,[70] while remaining silent in crucial moments (Dem. 18.308, 313). Voice is merely the extension of a man's character; it cannot alter his *ethos* and transform him from vicious into virtuous. Voice is just the instrument of communication; in principle, a person's *ethos* and spirit count (Dem. 19.336, 338).

All the aforementioned points illustrate Demosthenes' concern to diminish any effects that would arise from Aeschines' charismatic rhetorical delivery. Indeed, evidence reveals the existence of stereotypes linking voice with character. In the previously mentioned passage from the *Nicomachean Ethics*, Aristotle relates a deep voice and a deliberate utterance with the great-souled man. Conversely, to speak in shrill tones and walk fast denotes an excitable and nervous temperament. Loud and raucous voice could be interpreted as intimidating signs of an arrogant oligarchic member of the elite.[71] Vocal training could promote the stability, correct volume and malleability of voice, thus enhancing the performance techniques of a litigant.[72] Voice could contribute to the physical presentation of high valued notions such as *arête* (virtue) and *enkrateia* (self-control). Presupposed certain patterns of public conduct (the mode of speaking included), could be positively endorsed by the trained audience.

Such stereotypical presuppositions refer to every part of an orator's 'presentational arsenal': delivery, voice and appearance. The latter too came to reveal a person's character and beliefs, interpreted again by reference to stereotypical convictions of the audience. As has already been shown (Dem. 45.77), outward appearance and fast walking could be annoying for others, hinting at an undisciplined personality. On the other hand, meretricious public conduct was adequate for advertising a specific *ethos*.[73] The interpretation of appearance by reference to stereotypical conceptions could damage or enhance a litigant's case.

According to Demosthenes, Timarchus was 'jeered at through slanderous interpretation of his handsomeness' (Aes. 1.126). Undeniably, Aeschines focuses excessively on Timarchus' appearance, trying to provoke mockery, condemnation and disgust.[74] Fifty years earlier, shortly after the fall of the Thirty, when the growing of long hair was still a sign of elitist (even oligarchic or Spartan) sympathies, Lysias places his (long-haired young aristocrat) client Mantitheus as protesting against censure of such kind.[75] As a matter of fact, Lysias concentrates more than any other orator on appearance and physical characteristics. This may indicate the degree of the audience's expectations and stereotypical preconceptions during that particular era or it may be yet another factor revealing this orator's interest in (and mastery of) dramatic characterisation. Litigants' looks (supported by theatricality) provided direct evidence[76] and physical attributes could be displayed and manipulated in order to emphasise a vital point.[77]

To conclude then, although evidence as to the extent and the quality of theatrical delivery in Athenian courts is slim, it is unquestionable that at least a speaker's voice and appearance could provide evidence as to his character and beliefs. Based on the community's stereotypical presuppositions, orators presented and manipulated easily interpretable stock types in accordance with their interest. This approach created patterns of presentation (and rhetoric) which allowed for the anticipation and consistency of argumentation strategies. In this way, the court remained connected to society and its preconceptions, with the argumentation presented by litigants retaining its relevance according to their collective beliefs.[78] After all, a close examination of the aforementioned

evidence proves that a speaker's voice, physique and attributes were presented (and were interpreted by the audience) in a manner logically relevant to the case at hand. The accusation of Timarchus concerning prostitution was closely connected with his beauty; the physical disability of the speaker in Lysias 24 was directly relevant to his pension; the stereotypical assumption about the oligarchic sympathies of the long-haired youths was anticipated in a *dokimasia* where the fear of rejection due to cooperation with the Thirty was imminent; loud, raucous voice was linked with the intimidating behaviour of insolent members of the elite, and so on. Finally, to be clear, this enquiry is limited to the methods of character presentation in Athenian courts and their proximity (in accordance with Athenian beliefs) to the legal case at hand; therefore, any question or value judgment about the correctness of these stereotypical beliefs is beyond the scope of this study.

Logoi and *lexis*

Apart from *hypokrisis*, character portrayal could be effected by *logoi* (*what* should be said) and *lexis* (*how* it should be said). Invocation of poetry, remotely relevant laws and similes and comparisons were indirect methods of outlining character.

Comparisons

Starting with the last, the comparative way of thinking of the Athenians allowed for the extensive use of metaphors and contrasts. Aristotle in the *Rhetoric* continuously advises the proportionate and stylistically correct use of examples from the past or the imaginative invention of vivid and relevant comparisons.[79] In particular, he proposes the (positive or negative) contrast with well-known historical figures (1368a). This method of character portrayal is frequently evidenced in the Attic speeches. Although reluctant to contrast themselves with the famous and idealised heroes of the past, speakers often resort to association of their opponents with persons notorious for their negative deeds.[80] Whenever a comparison with notable figures of the past was adduced, it was simply invoked to reveal the littleness of the adversary.[81] Serious ethical weaknesses of past figures were also mentioned, as being shared by the opponent,[82] and even comparison with mythical personas was put into play.[83] All of them were drawn from a pool of relevant past incidents, supporting the speaker's argumentation in relation to a character trait of the opponent relevant to the offence.[84]

The orators, in conformity with Aristotle's suggestions (*Rhet*. 1384a), respected the idea that comparison is particularly effective with men who resemble us. Demosthenes compares his character and deeds with Aeschines' (Dem. 18.265; for similar direct comparison between litigants cf. Dem. 50.58) and Aeschines' treacherous behaviour with his co-ambassadors' upright behaviour (Dem. 19.229–30). Against Meidias, he contrasts his own prudent reaction with that of other victims found in similar situations (21.39, 71ff.), and Meidias' insolent

attack with the lesser insolence of previous notable offenders (21.38, 63ff.). Meidias had surpassed them all. Finally, as Aristotle observes (*Rhet*. 1368a) 'if a man has done anything alone, or first, or with a few, or has been chiefly responsible for it; all these circumstances render an action noble'. Demosthenes took advantage of it, advertising his outstanding behaviour during the crisis of Elateia (18.173).

Past acts and previous deeds could thus be offered for comparison, illuminating a person's character and allowing jurors to assess him by reference to common standards. Nevertheless, the invocation of such acts took the form of argumentation from precedent. This is a controversial issue which has attracted the attention of recent scholarship.[85] Though I am convinced by the arguments offered by Harris as to the value of such argumentation to a legal case, the purpose here is to shed light on another use of precedent in Athenian courts: that of character portrayal. This is also discussed by Aristotle (cf. Arist. *Rhet*. 1356b, 1357b, 1377a, 1393a etc.) who exemplifies the use of rhetorical examples in proving a litigant's argument. This form of argumentation may take two forms: i) a direct comparison of the acts triggering the legal charge, or ii) the comparison of an opponent's character with that of a previous offender. These two could interrelate yet this study is particularly concerned with the second. This 'character comparison' could be especially beneficial for the speaker: i) when he seeks to emphasise a particularly relevant character trait in the opponent that was allegedly shared by a past perpetrator and was decisive to his conviction, or ii) when he highlights the fact that the present defendant is morally reprehensible in an even greater degree.

In the (admittedly relevant to the legal case) examples from precedent offered by Demosthenes against Meidias, the defendant's arrogance and intemperance is emphasised by contrasting it with former convicted offenders (21.38). Earlier precedent was invoked to reveal the reasonableness of notable men who succumbed to the authority of the laws and the power of the demos, as opposed to the disrespect shown by lawless and insolent individuals finding themselves on trial (Dem. 26.6−7; 24.134−8; cf. 19.271−81). The list of examples that prove this use of precedent as a method of character portrayal is quite long. It includes comparisons between former trierarchs convicted for cowardice and desertion of their posts (Dem. 51.8−9), betrayal of the country (Lyc. 1.52−3; 93, 112, 117, 122), instigation to manslaughter by mere words as opposed to the defendant's aggressive and violent nature (Dem. 54.25), and the contrast of a former hierophant's worthiness and merit (who was nonetheless convicted) against the sacrilegious and lawless prostitute Neaera (54.25).[86] The main point is that character evidence could be offered by divergent means, left to the initiative and the imagination of the orators.

Citation of laws

Reference to legal documents that could allegedly be applicable to the particular case assisted a litigant to enliven his argumentation and sketch the characters of the parties. For instance, Ariston, the speaker of Demosthenes 54, cites the

law against hubris in order to reveal its applicability to the defendant's conduct, further emphasising the gravity of his offence. However, the speaker's choice of indicting him for a less serious offence (*dike aikeias*) reveals his modesty and lack of vindictiveness. Therefore, citation of laws could be used to reveal the character and ethics of both litigants. In such a way, the applicability of a statute in a particular case reflected the character of the party that resorted to the prohibited conduct, as well as the moderation of the speaker and his adherence to the laws of the state.[87]

An interesting example is the citation of laws by the inattentive young speaker of Hypereides 3 (*Against Athenogenes*). In that speech, Athenogenes, an Egyptian perfumer, was accused of fraud in the sale of his business due to the inappropriate 'fine print' of the contract transferring huge debts to the plaintiff. According to the laws of Athens, the fault stood at the buyer's side who, carelessly, signed the contract. The young prosecutor makes an extensive use of (at first glance) irrelevant legal statutes. These, cumulatively, unveil the 'spirit of Athenian laws', which are seen as a single, diachronic entity. The aim of the prosecutor in citing these laws was to reveal the defendant's breach of their spirit. His non-adherence to the communal norms and his Egyptian origin made him an ethical outsider whose character and personality proved his intention of tricking the inexperienced speaker into signing the agreement. Furthermore, the speaker's – now scholastic – knowledge and use of statutes (which he was in haste to justify), although attributed to *force majeure*, is contrasted with his previous folly in signing the contract, emphasising thus the fact that his character has changed. His adherence to the laws of Athens (in opposition to his Egyptian adversary) and the improvement of his conduct made him stand morally on the right side and therefore undeserving of this unjust punishment caused by the unfair contract.[88] As a rule, nevertheless, balance should be kept in the use of legal statutes, since detailed knowledge of the laws could be stereotypically interpreted as suspicious (i.e. a prerequisite for sycophancy).

Poetry

Another authority, standing beside the laws and similarly shaping people's norms and behaviour, is poetry.[89] Epic and lyric poetry provided the 'norm' of righteous conduct that should be adhered to and followed. Aristotle recommends its use as a kind of ancient testimony or evidence, sanctioning a litigant's argumentation.[90] The mere invocation of didactic passages highlights the speaker's education as well as his adherence to the notions he mentions. This partly explains the citation of poetry solely by senior political figures in high-profile public cases. In the unwelcome event of lack of witnesses, poetry could provide supportive guidelines for the interpretation of the law or the assessment of a character's uprightness. This can be seen in Aeschines' analysis and use of a verse from Euripides:

> Many a time ere now have I been made
> The judge in men's disputes, and oft have heard
> For one event conflicting witnesses.

> And so, to find the truth, I, as do all
> Wise men, look sharp to see the character
> That marks the daily life, and judge by that.
> The man who loves companionship of knaves
> I care not to interrogate. What need
> Is there? I know too well the man is such
> As is the company he loves to keep.

'Examine the sentiments, fellow citizens, which the poet expresses. He says that before now he has been made judge of many cases, as you today are jurors; and he says that he makes his decisions, not from what the witnesses say, but from the habits and associations of the accused; he looks at this, how the man who is on trial conducts his daily life, and in what manner he administers his own house, believing that in like manner he will administer the affairs of the state also; and he looks to see with whom he likes to associate. And, finally, he does not hesitate to express the opinion that a man is like those whose "company he loves to keep"' (Aeschin. 1.152–53).

The relevance of this analysis to the argumentation of Aeschines is noteworthy. In the extant speech, Aeschines focuses on the reprehensible habits of Timarchus, emphasising his association with disreputable men. The truth of this verse is also reflected in the fact that. as Timarchus squandered his patrimony in order to finance his immoral desires, in the same way he mismanaged and embezzled public property. The provision of the law which forbids the exercise of civic rights for those who had debauched or prostituted themselves reflects the same basic idea:

> For the man who has made traffic of the shame of his own body, he thought would be ready to sell the common interests of the city also (Aeschin. 1.29).

In all the above Euripides stands as witness. In addition, in anticipation of his opponents' arguments, distinction should be drawn between legitimate and 'Timarchean' love. Again the intellectual and moral heritage of poetry, in the verses of Homer now, is invoked (Aeschin. 1.141ff.).[91]

Apart from Aeschines, another orator, Lycurgus, used poetry extensively in his orations.[92] Again, the aim was successful and vivid character portrayal by comparing his opponent's alleged acts against the standards of behaviour offered by the poets. Through the quotation of verses from Homer, Euripides and Tyrtaeus, Lycurgus emphasises the magnitude of Leocrates' offence which amounted to treachery. Simultaneously, he demonstrated his own adherence to these norms, presenting a solemn patriotic *ethos*. The quotation of epigrams commemorating the heroism of the war dead in Marathon and Thermopylae further highlights Leocrates' betrayal. Lycurgus promised to make a just accusation, neither falsifying nor speaking outside the point (Lyc. 1.11, 23). In his opinion

(and presumably in the jury's) he 'conducted the trial rightly and justly without slandering the private life of the defendant or digressing from the subject of my [his] indictment' (Lyc. 1.149).

Quotations from poetry operated as the epitome of the Athenian common standards of behaviour against which a person's character and deeds had to be assessed. In Athenian society, which was – when compared to modern societies – ethically and ideologically coherent, communal expectations as to a person's mode of behaviour were distinct. Their ideas of character and personality directed a wholehearted adherence to the norms of the polis, proved by deeds, over and above egoistic considerations. The identicality of written law and unwritten ethical norms (expressed as legal enforcement of morals) promoted the uniformity of behavioural standards among citizens. As a result, the importance of character evidence was upgraded, with litigants proving their simultaneous adherence to laws and morals by the use of a single argument. Conformity with laws signified conformity with morals and vice-versa, thus leaving limited scope (e.g. in cases of absence of written laws as the Heliastic oath indicates) for external considerations such as equity. Taking into account the conservative nature of Athenian society a consistency of approach regarding the execution of justice emerged. The application of the rule of law, decision-making consistency, and execution of justice were complementary.

Silence as character evidence

A society which meditated in the form of binaries and contrasts and put exceptional emphasis on written and spoken *logos* would, unsurprisingly, develop a deep understanding of the importance of silence. Pythagoras trained his followers in a five-year silence test that silence too is *logos* ('*καὶ τὸ σιωπᾶν λόγος*') (Philostr. *Life of Apollonius*, 1.1). In the Athenian courts, the presentation of character could be achieved either by the things said or by those unsaid. Decency ordained the avoidance of licentious language even when describing the adversary's acts.[93] Respectable men not only shrink from performing such acts but restrain themselves from merely mentioning them, even by using euphemistic language.[94] Others, apart from their adherence to decency, also highlight their respect for family bonds in order to justify their silence and simultaneously portray their character.[95]

Further proof is provided by the speaker of Lysias 3, another example of the orator's mastery in dramatic characterisation. Facing the charge of 'wounding with premeditation' and arguing his case before the Areopagus, he concentrates on his age, social standing and respectability in encountering his opponent's pleas. Well-known for his public services and military achievements, as opposed to his provocative opponent's characteristically violent and antisocial past conduct, he acknowledges the danger he faces by the mere disclosure of the events. Highly vexed by this fact, he asks for the jurors' pity, not for the possibility of conviction, but 'for having been compelled, as a result of such transactions,

to stand my trial on such a charge' (Lys. 3.48). Shame and decency ordained silence, secrecy, or better quietness, for a man of his character (3.9, 10, 30, 40). Such a man would never risk all his life's achievements by resorting to such senseless acts (3.4, 34, 41). His character's portrayal was complete.

Finally, (as in modern courts)[96] negative character testimonies such as 'I've never heard anything ill of the defendant's character' could also be adduced or transmitted by the speakers[97]. However, in modern courts this role is reserved for the witnesses, whereas in the courts of classical Athens litigants themselves provoked or incited the audience or even their opponent to testify on the truth of such a matter. The supposition was that if there was a negative testimony to an alleged fact, it would have been received as true by the court.

Conclusion

The Athenian ideas of character (discussed in Chapter 3) illuminate their courts' approach to character evidence. The inductive mode of deliberation necessitated the reference to numerous incidents from a litigant's past life in order to prove the desirable point. As Lycurgus said in *Against Leocrates*: 'For if my point is backed by frequent illustrations, I am rendering your verdict easy' (Lyc. 1.124). Furthermore, the absence of firm conclusions on the subject allowed for the existence of a variety of methods in providing evidence. The newly developed art of rhetoric and the emphasis on performance as a key factor of Athenian culture provided even more available methods for presenting a case. The persuasive strength of delivery, supported by a carefully drafted speech with references to examples, analogies and widely acknowledged authoritative sources, promoted the vividness and effectiveness of character evidence.

The social concord as to the accepted communal norms and the wide agreement on the value of cooperative virtues, rendered argumentation in courts consistent, predictable and grounded on traditional patterns. As a result, and taking account of the procedural norms that litigants and jurors should respect, it is not unlikely that the Athenian courts could actually achieve a significant degree of consistency. After all, no litigant ever criticised the jurors for an inconsistent approach. On the contrary, citation of precedents was not uncommon, having persuasive power. The overall aim of litigants, especially when the point of dispute rested on the interpretation of the facts of the case which was the rule in Athenian courts, was to highlight a character trait particularly relevant to the case at hand, in order to reveal adherence or disrespect for communal norms. This would in turn mean adherence to or disrespect for the law codifying the communal norm.

This brings us to the link between this chapter and the next, which examines the Greek perceptions of 'personhood'. The Greeks viewed the 'person' as overwhelmingly a social being which was primarily a constituent of the polis and only secondarily an 'individual'. They evaluated 'personality' by reference to the social role ascribed to the person and to his adherence to shared values. Any

person shown to act in uniformity with them was simultaneously credited with loyalty to the polis and its laws. Contrastingly, disrespect for collective norms (as revealed by reference to past acts) reflected the existence of character flaws which, in the extreme, proved a detachment of the person from the community. In the next chapter these Greek perceptions of 'personality' and the 'person' will be discussed and more light will be shed on litigants' patterns of argumentation.

Notes

1 Cf. Gagarin (2003), esp. at p. 197: 'New approaches have taken over [in the study of Athenian law], approaches that, although healthy and stimulating in many ways, tend to exaggerate the otherness of Athenian law. This is not so much because historians present a false picture of Athenian law, as because they misrepresent aspects of our own legal system, relying on a traditional, idealistic view of it that is increasingly being challenged by certain branches of contemporary legal studies. When we take a more realistic look at our own system, however, Athenian law may not appear so different.'
2 Keane (2010), p. 439.
3 Munday R. (2005), p. 38.
4 *Rowton* (1865) L. & C. 520; *Redgrave* (1982) 74 Cr.App.R. 10; Munday R. (1997), p. 248.
5 E.g. Auld L.J., *Review of the Criminal Courts of England and Wales: Report* (London, TSO, 2001); cf. McEwan (2002).
6 *Rowton* (1865) L. & C. 520; *Redgrave* (1982) 74 Cr.App.R. 10.
7 Munday (1997), p. 248.
8 Howard, Crane and Hochberg, (1990) §18.14.
9 Munday R. (2005), p. 41.
10 Criminal Justice Act 2003, s. 105 (5).
11 Researchers tend to criticise Aeschines' attack on Demosthenes' character in 1.170−6 as irrelevant. In my opinion, following the same method of reasoning, it is not. Demosthenes, the supporting speaker for the defence, was one of Timarchus' closest associates. He is presented as Timarchus' alter ego in an effort to reveal his lack of credibility. He is accused for exactly the same kind of behaviour (squandering patrimony, corrupt, indecent pervert, patron etc.), making the audience wonder as to who is more to blame and to be condemned. In this way, not only does he cancel out Demosthenes' trustworthiness, but he also highlights the fact that 'like calls to like', both being reprehensible and damnable.
12 Lys. 1.10−5; cf. Todd (2008), p. 93; Carey (2011), pp. 35−6.
13 See Rhodes (1981), p. 647.
14 For the defendant's temperance see Lys. 3.4, 9−10, 13, 17, 30, 40; for the prosecutor's hubris see Lys. 3.5, 6, 8, 12, 15−8, 23, 29, 45; cf. Todd (2008), pp. 278ff.; Carey (2011), p. 82. The same pattern is followed by Demosthenes in Dem. 54.
15 Carey (2011), p. 109: 'Lysias presents us with a plausible villain (even where he offers no corroborative evidence) by striving for consistency in the actions narrated. Diogeiton conceals the scale of the estate as he conceals his brother's death. He cheats on his daughter's dowry, as he cheats his wards by cunningly transferring to them the whole cost of sacrifice (§21), funeral monument (§21) or liturgy (§24, §26) disguised as half the cost. And he persistently avoids attempts to resolve the dispute' (§2, §12).
16 Lanni (2006), pp. 46ff.
17 Regarding Theophemus' and the witnesses' conduct see for example Dem. 47.28, 31−3, 52ff. For the speaker's see Dem. 47.34−6, 38, 68ff.

18 See Griffith-Williams (2012); cf. Ch. 2.2.2 and 2.3.3.
19 The same is true for solecism as an indication of barbarism (cf. Dem. 45.30; 36.1; but see Plat. *Apol*. 17d–18a). For growing long hair as a sign of elitism see Lys. 16.
20 See the discussion of 'shame-culture' versus 'guilt-culture' in Chapter 5. Cf. Cairns (1993).
21 Keane (2010), p. 439.
22 *Rowton* (1865) L. & C. 520; *Redgrave* (1982) 74 Cr.App.R. 10.
23 Howard, Crane and Hochberg (1990), §18−14.
24 Another remnant of the pre-fourth century age referred to in Chapter 1; cf. Humphreys (1985); Thür G. (2005).
25 On the role of witnesses see Thür G. (2005); Humphreys (1985); Todd, (1990b); Rubinstein (2005). For a different view, namely that the legal risk of being prosecuted for false witnessing forced even a litigant's supporters to testify the truth, see Mirhady (2002) and Scafuro (1994).
26 Also discussed by Hunter (1991).
27 E.g. Aeschin. 1.90: 'while the man on trial, who has been denounced by the testimony of his own life and of the truth, is to demand that he be judged, not by the facts that are notorious, but by the testimony of witnesses, then the law is done away with, and so is the truth.'
28 Cf. Aeschin. 1.20, 44, 55, 80, 157, 186, 189.
29 E.g. Aeschin. 1.159: 'To which class do you assign Timarchus—to those who are loved, or to those who are prostitutes? You see, Timarchus, you are not to be permitted to desert the company which you have chosen and go over to the ways of free men.' This very impressive tactic was used by Demosthenes against Aeschines himself in Dem. 18.52: 'I call you Philip's hireling of yesterday, and Alexander's hireling of today, and so does every man in this Assembly. If you doubt my word, ask them; or rather I will ask them myself. Come, men of Athens, what do you think? Is Aeschines Alexander's hireling, or Alexander's friend? You hear what they say.'
30 E.g. Aeschin. 1.89: 'Now if this trial were taking place in another city, and that city were the referee, I should have demanded that you should be my witnesses, you who best know that I am speaking the truth. But since the trial is at Athens, and you are at the same time judges and witnesses of the truth of what I say, it is my place to refresh your memory, and yours not to disbelieve me.'
31 E.g Aeschin. 1.85: 'This, then, I understand to be the testimony that has been offered you by the people of Athens, and it would not be proper that they should be convicted of giving false testimony. When I, fellow citizens, say not a word, you of yourselves shout the name of the acts of which you know he is guilty; strange, then, it would be if when I name them, you cannot remember them; even had there been no trial of this case, he would have been convicted; strange indeed then if when the charge has been proved, he is to be acquitted!'
32 Aeschin. 1.44: 'Indeed, I am very glad that the suit that I am prosecuting is against a man not unknown to you, and known for no other thing than precisely that practice as to which you are going to render your verdict. For in the case of facts which are not generally known, the accuser is bound, I suppose, to make his proofs explicit; but where the facts are notorious, I think it is no very difficult matter to conduct the prosecution, for one has only to appeal to the recollection of his hearers.' Cf. 1.116.
33 Aeschin. 1.93: 'In the first place, let nothing be more credible in your eyes than your own knowledge and conviction regarding this man Timarchus. In the second place, look at the case in the light, not of the present moment, but of the time that is past. For the words spoken before today about Timarchus and his practices were spoken because they were true; but what will be said today will be spoken because of the trial, and with intent to deceive you. Give, therefore, the verdict that is demanded by the longer time, and the truth, and your own knowledge.'

34 Cf. Aeschin. 1.125ff. referring to the dedication of Common Report and its unerring approach to people's conduct, presenting quotations from poetry as evidence.
35 Dem. 21.1, 195, 134: 'If you did what your fellow-troopers say you did, Meidias, and what you complain of them for saying, then you deserved their reproaches, because you were bringing harm and disgrace both on them and on these jurymen here and on all the city. But if you did not do it and it was all a fabrication, and if the rest of the soldiers, instead of reproving the slanderers, chuckled over you, it only shows that from your general manner of life they thought that such a story exactly fitted you. It was yourself, then, that you ought to have kept more under control, instead of accusing the others.' Demosthenes uses arguments from reputation frequently, cf. 24.128, 34.40, 45.63.
36 Indicatively see Lys. 6.3, 6; 7.12; for reputation among the Greeks Lyc. 1.14.
37 Timarchus' notoriety in his immediate environment and among his fellow demesmen (apart from his general reputation discussed above) played an important role in Aeschines' portrayal of his character. Cf. Aeschin. 1.44–7, 59, 67–9, 78, 103–4 and against Demosthenes 2.155.
38 Direct knowledge of the facts assisted in the determination of status (e.g. Lys. 13.64, 23.4, 8, 11), citizen virtue and liturgies (e.g. Lys. 16.8, 13–4, 17; 19.58–9; 20.25; 21.10; 31.14, 16, 19), family relations and kin's uprightness of conduct (e.g. Lys. 20.26–9; 32.18), and lawlessness and disrespect for social norms (31.23; 13.66, 68, 81–2).
39 Arist. *Rhet*. 1418b: 'In regard to moral character, since sometimes, in speaking of ourselves, we render ourselves liable to envy, to the charge of prolixity, or contradiction, or, when speaking of another, we may be accused of abuse or boorishness, we must make another speak in our place, as Isocrates does in the *Philippus* and in the *Antidosis*.' On avoiding envy in Athenian courts, see Spatharas (2011); Dyck (1985).
40 These mostly take place in the speeches of Aeschines, for e.g. 1.41, 62, 67, 103; 2.64, 155; cf. Dem. 45.71.
41 For characterisation of supporting speakers, either in a positive or negative way, see for example Andoc. 1.150; Lys. 30.31, 34; 31.32; 32.1; Lyc. 1.138; Aeschines v Demosthenes in 1.131–2, 141, 163, 166–7, 170–5, 181, 194–5; the whole of Aeschines 3 turns arrows against Demosthenes, the main target, while in 2.184 he presents his own supporting speakers in a positive manner. Cf. Rubinstein (2000).
42 See for example Aeschin. 1.70.
43 Aeschin. 1.152, quotation taken from Euripides' *Phoenix*.
44 See for example Hom. *Od.* 17.218; Plat. *Symp*. 195b; Arist. *Eudemian Ethics* 1235a; Theoprh. *Char.*XXIX.
45 Indicatively see Aeschin. 3.57–8, 60–2, 72; Dem. 19.8, 15, 23, 94–7, 115, 119, 144, 150, 174, 189, 236, 245, 333. Aeschines tries to associate Demosthenes with Callias of Chalcis in 3.89, 94, 104.
46 See Lys. 12.62ff.
47 Indicatively, for more examples one could look at Lys. 16.11; 24.5; fr. 1 (2); Dem. 18.21, 82, 131, 137; 21.110, 139, 190, 209; 22.38; 24.130, 174; 25.37, 39, 45, 61; 34.36; 37.48; 38.27; 39.2; 40.9, 32, 57; 43.48; 52.20–2; 54.31–7; 56.7; 57.60; 58.27.
48 Lys. 1.4, 8, 15–6, 26.
49 See for e.g. Lys. 19.18, 23, 42–3.
50 See for e.g. Lys. 13.1–2, 60–2, 92.
51 Arist. *Rhet*. 1403b: 'as at the present day actors have greater influence on the stage than the poets, it is the same in political contests, owing to the corruptness of our forms of government. But since the whole business of Rhetoric is to influence opinion, we must pay attention to it, not as being right, but necessary; for, as a matter of right, one should aim at nothing more in a speech than how to avoid exciting pain or pleasure. For justice should consist in fighting the case with the facts alone, so that everything else that is

beside demonstration is superfluous; nevertheless, as we have just said, it is of great importance owing to the corruption of the hearer.'

52 Fortenbaugh (1986).

53 Porter (2009), pp. 97−8 narrates his interpretation of the process as such: 'A parallel development appears to have taken place in the realm of *hupokrisis*, or delivery, which gradually detached itself from its origins in drama and came to be transferred over to the art of rhetoric. Dramatists at first acted in their own plays (1403b23–4), but owing to the increased complexity of the stage and, no less importantly, to the powerful appeal of delivery (to which Aristotle's bears witness), they then turned these roles, and their voices, over to professional actors. The need for practical manuals arose, and eventually parallels to rhetorical delivery were noticed, for instance by Thrasymachus in his *Appeals to Pity* (1404a14). But apparently no substantive technical treatise on rhetorical *hupokrisis* existed down to Aristotle's day, even if handbooks on acting and uses of the voice and vocalisation in poetic contexts (for instance, tragic and rhapsodic recitations) had been developed, such as that by Glaucon of Teos (1403b21–6).'

54 Cicero, *On the Orator* 3.213; cf. *Rhetoric to Herennius* 3.19; Quintilian 11.3.2.

55 Steel (2009).

56 Scafuro (1997), esp. pp. 50−66. Cf. Kavoulaki (1999); Buis E. (2004).

57 See Ober and Strauss (1990).

58 Carey (1994), pp. 40−2.

59 Bers (2009), p. 92; cf. Konstan (2000); *pace* Johnstone (1999), p. 116 with n. 44.

60 Dem. 19.252: 'He illustrated his remarks by representing to the jury the attitude of the statue; but his mimicry did not include what, politically, would have been much more profitable than an attitude – a view of Solon's spirit and purpose, so widely different from his own.'

61 See for example Fredal (2001); judging from the words of the speech, other 'theatrical' passages can also be traced, such as Dem. 19.255.

62 Arist. *Rhet*. 1403b26ff.: 'Now delivery is a matter of voice, as to the mode in which it should be used for each particular emotion; when it should be loud, when low, when intermediate; and how the tones, that is, shrill, deep, and intermediate, should be used; and what rhythms are adapted to each subject. For there are three qualities that are considered – volume, harmony, rhythm.'

63 *Nic. Eth*. 1125a13−14.

64 Demosthenes, after his failure in his first public appearance, is said to have studied elocution under the actor Neoptolemus. Also famous are the accounts of Demosthenes shouting against the sea and rehearsing with pebbles in his mouth. [Plut.], *Lives of the Ten Orators*, 844; Plut. *Dem*. 6−7, 11.

65 Cf. Hom. *Il.* 3.221 (Odysseus' great voice which totally changed his appearance); 5.764 (the proverbial voice of Stentor); the Bards were also aware of the voice's imitative powers, see for example 13.195; cf. *Homeric Hymn to Apollo* 171−5.

66 Diog. Laert. 8.10, 15; Iamblichus, *Life of Pythagoras* 7: Pythagoras used to lecture for long periods to his pupils, whether hidden behind a curtain or lecturing only at night in utter darkness. 'For five years [his disciples] would keep silent, merely listening to his speeches without seeing him, until they passed a test. From that point on they were allowed into his house and were able to see him.'

67 Porter (2009), p. 93; cf.: 'The emergence of the voice in the guise of disembodied logos represents the triumph of the voice as an aesthetic phenomenon in its own right, its liberation from the constraints of sight, though not from the body per se. The voice when it is heard has a body of its own: it has pitches, melodiousness, timbre, rhythms, and other euphonic qualities.'

68 E.g. Dem. 19.216: 'You must not notice what a fine loud voice he has, and what a poor voice I have'; cf. 19.206. Even if this natural defect of Demosthenes has been improved

by his maturity, the recurrent reference and comparison with Aeschines' voice proves his relevant inadequacy, or at least his concern.

69 19.337: 'On that famous voice of his, however, I really must offer some observations. For I am informed that he sets great store thereby, and that he hopes to overawe you by an exhibition of histrionic talent. When he tried to represent the woes of the House of Thyestes, or of the men who fought at Troy, you drove him from the stage with hisses and cat-calls, and came near to pelting him with stones, insomuch that in the end he gave up his profession of actor of small parts; and I think you would be behaving very strangely if now, when he has wrought measurable mischief, not on the stage, but in his dealings with the most momentous affairs of state, you should be favourably impressed by his beautiful voice.'

70 Dem. 18.280: 'It really makes me think, Aeschines, that you deliberately went to law, not to get satisfaction for any transgression, but to make a display of your oratory and your vocal powers. But it is not the diction of an orator, Aeschines, or the vigour of his voice that has any value: it is supporting the policy of the people, and having the same friends and the same enemies as your country.'

71 Cf. Dem. 21.72; 25.9; 57.11; Is. 6.59.

72 The speaker's grievance in Dem. 45.77 proves the point: 'For myself, men of Athens, in the matter of my outward appearance, my fast walking, and my loud voice, I judge that I am not one of those favoured by nature; for in so far as I annoy others without benefiting myself, I am in many respects at a disadvantage.'

73 Cf. Dem. 19 314: 'Behold him pacing the market-place with the stately stride of Pythocles, his long robe reaching to his ankles, his cheeks puffed out, as who should say, "One of Philip's most intimate friends, at your service!" He has joined the clique that wants to get rid of democracy – that regards the established political order as an inconstant wave – mere midsummer madness.'

74 Cf. Aeschin. 1.61, 95: 'and this man [Timarchus] himself, not yet, by Zeus, repulsive to the sight as he is now, but still usable', 'this defendant [Timarchus] had lost his youthful charm, and, as you would expect, no one would any longer give him anything'.

75 Lys. 16.19: 'it is not fair, gentlemen, to like or dislike any man because of his appearance, but rather to judge him by his actions; for many who are modest in speech and sober in dress have been the cause of grievous mischief, while others who are careless of such things have done you many a valuable service.'

76 Depending on the nature of the case, such evidence could be critical; see for example Lys. 24 (For the Disabled Man), where the (obvious to the audience) physical disability of the speaker could prove decisive for the jurors' decision; see esp. 24.7, 12 [on this speech see Wohl V. (2009)]; for Lysias' use of outward appearance as evidence cf. Lys. 31.12: 'This man, therefore, deserves no indulgence; for neither was he disabled and thus unfit for hardship, as you see for yourselves . . . '

77 See for example Lys. 10.29 where Lysias stresses the antithesis between the adversaries' strong bodies and coward souls: 'And indeed, gentlemen, the taller and more gallant they are in looks, the more they are deserving of anger. For it is clear that, though strong in their bodies, they are ill in their souls'; cf. Lys. 31.12; 20.3.

78 In reality, how remote from the Athenian practice is the section 105 (5) of the Criminal Justice Act 2003, providing that the 'appearance' and even the 'dress' of a defendant may classify as 'conduct'? This section, entitled 'Evidence to Correct a False Impression' allows the prosecution to adduce evidence in order to correct a false impression made (expressly or impliedly) by the defendant's conduct at the time of the trial. It provides: '101 (4): Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression. 101 (5) provides: In subsection (4) "conduct"

includes appearance or dress".' For example, if the defendant appears in court wearing a clerical collar or a military or police uniform. Even if he holds a copy of the Bible in his hands while giving evidence about his respectable family life, he may be said to be responsible for the creation of a misleading impression. See *Robinson* [2001] Crim LR 478 with Glover and Murphy (2013), p. 191 who expresses the hope that this case would be decided differently under the CJA 2003.

79 See for example Arist. *Rhet*. 1356b, 1357b, 1377a, 1393a etc.

80 See for example Lys. 6.17, 45; 21.20; Dem. 58.38. Also, for the frequent comparisons with the Thirty see Andoc. 1.101; Lys. 25.31; Dem. 24.90, 164.

81 Usually such comparison was invoked in public disputes (e.g. about the worthiness of a person for crowning or the legitimacy of a legal statute). Aeschines contrasted Demosthenes with Pericles and Miltiades in order to highlight his smallness for being crowned (Aeschin. 3.181), with Demosthenes using the same argument against Charidemus (23.196ff.) and Aristogeiton (26.6). However, when this argument was used against him by Aeschines, he discarded it as irrelevant since one ought to be judged by reference to contemporaries (Dem. 18.209, 316ff.).

82 Dem. 21.143ff; 165.

83 Dem. 19.247; 18.127, 180; Antiph. 1.17.

84 Metonymies and metaphors could also be used in a positive manner, emphasising the speaker's positive traits [see Wohl (2009)].

85 Harris (2007); *pace* Lanni. (2004).

86 The more general issue of character worthiness is addressed in Dem. 23.199−200, when Demosthenes is comparing the honours given to previous benefactors of Athens with the proposal of Aristocrates for the bestowment of great (and illegal) honours to Charidemus. Demosthenes, via this comparison, questions not only the legality of the proposed law but the worthiness of the acceptor per se.

87 For further analysis and examples see De Brauw (2001).

88 Cf. Scafuro (1997).

89 See for example Dorjahn (1927); Perlman (1964); Ford A. (1999).

90 Arist. *Rhet*. 1375a−b.

91 Aeschines was fond of using poetry in his speeches. Relevant verses are used for the justification of his arguments concerning reputation and common report (*φήμη*) (Aeschin. 1.129; 2.144ff) or offering a comparison between his contemporaries and the distinguished men of the past (3.184−5, 190). Demosthenes replied to these in 18.209, 316.

92 Although only one of his orations survives, it is safe to conclude that Lycurgus used poetry freely in all his speeches. Cf. Dorjahn (1927), p. 88 with n. 7.

93 See Carey (1994), pp. 174−5: 'In theory of course this type of constraint looks like a terrible handicap. In practice it is an enormous boon. Litigants are well aware that if the jurors are left to imagine the details for themselves they will come up with something far more shocking than the actuality. Speakers are also able to exploit such modest silence in order to present themselves as men too decent to utter filth, while the opponent emerges as someone who is prepared to do things which decent people shudder even to utter.'

94 Dem. 21.79; 54.9, 17; for a very indicative example see Aeschin. 1.55: 'Now the sins of this Pittalacus against the person of Timarchus, and his abuse of him, as they have come to my ears, are such that, by the Olympian Zeus, I should not dare to repeat them to you. For the things that he was not ashamed to do in deed, I had rather die than describe to you in words'; cf. Aeschin. 1.76.

95 Dem. 45.3: 'As for myself, men of the jury, a large property was left me by my father, and this was in the possession of Phormio, who furthermore had married my mother while I was out of the country on public business, serving as your trierarch. (How he managed it, perhaps it is not proper for a son fully to explain about his mother).'

96 *Rowton* (1865) L. & C. 520; *Redgrave* (1982) 74 Cr.App.R. 10; Munday (1997), 248.

97 See for e.g. Dem. 21.176; 29.24; 37.56; Ant. 6.9; Lys. 5.3; 7.25−9.

References

BERS V. (2009), *Genos Dikanikon: Amateur and Professional Speech in the Courtrooms of Classical Athens*, Harvard: Harvard University Press.

BUIS E. (2004), *How to Play Justice and Drama in Antiquity: Law and Theatre in Athens as Performative Rituals*, Florida Journal of International Law, Vol. XVI, 697.

CAIRNS D.L. (1993), *Aidōs: the Psychology and Ethics of Honour and Shame in Ancient Greek Literature*, Oxford: Clarendon.

CAREY C. (1994), 'Legal Space in Classical Athens', *Greece & Rome*, Vol. XLI, No. 2, October 1994, 172−86.

——— (2011), *Trials from Classical Athens* (Routledge Sourcebooks for the Ancient World), London: Routledge.

DE BRAUW M. (2001) "Listen to the Laws Themselves": Citations of Laws and Portrayal of Character in Attic Orator', *Classical Journal* 97. (2001), 161−76.

DORJAHN A. (1927), 'Poetry in Athenian Courts', *Classical Philology* (Jan., 1927), 85−93.

DYCK A.R. (1985), 'The Function and Persuasive Power of Demosthenes' Portrait of Aeschines in the Speech "On the Crown"', *Greece & Rome* 32.1, 42–8.

FORD A. (1999), 'Reading Homer from the Rostrum: Poems and Laws in Aeschines' *Against Timarchus*', in S. Goldhill and R. Osborne (eds), *Performance Culture and Athenian Democracy*, Cambridge: Cambridge University Press.

FORTENBAUGH W. (1986), 'Aristotle's. Platonic Attitude toward Delivery', *Philosophy and Rhetoric* 19 (1986), 242−54.

FREDAL J. (2001), 'The Language of Delivery and the Presentation of Character: Rhetorical Action in Demosthenes' *Against Meidias*', *Rhetoric Review*, Vol. 20, Nos. 3/4, 2001, 251−67.

GAGARIN M. (2003), 'Telling Stories in Athenian Law', *Transactions of the American Philological Association*, Volume 133, Number 2, Autumn 2003, 197−207.

GLOVER R. and MURPHY P. (2013), *Murphy on Evidence*, New York: Oxford University Press.

GRIFFITH-WILLIAMS B. (2012), '*Oikos*, Family Feuds and Funerals: Argumentation and Evidence in Athenian Inheritance Disputes', *Classical Quarterly* 62.1 (2012), 145–62.

HARRIS E.M. (2007) 'Did the Athenian Courts Attempt to Achieve Consistency? Oral Tradition and Written Records in the Athenian Administration of Justice', in Cooper, C. (ed.), *Politics of Orality*, Leiden: Brill, 343−70.

HOWARD M.N., CRANE P. and HOCHBERG D.A. (1990), *Phipson on Evidence* (fourteenth edn), London: Sweet & Maxwell.

HUMPHREYS S. (1985) 'Social Relations on Stage: Witnesses in Classical Athens', in S.C. Humphreys (ed.), *The Discourse of Law*; *History and Anthropology* 1.2., London: Routledge.

HUNTER V. (1991), 'Gossip and the Politics of Reputation in Classical Athens', *Phoenix* 45.1, 299−325.

JOHNSTONE S. (1999), *Disputes and Democracy: the Consequences of Litigation in Ancient Athens*, Austin, TX: University of Texas Press.

KAVOULAKI A. (1999), 'Processional Performance and the Democratic Polis', in Simon Goldhill and Robin Osborne (eds), *Performance Culture and Athenian Democracy*, Cambridge: Cambridge University Press, 293−320.

KEANE A. (2010), *The Modern Law of Evidence* (eighth edn), New York: Oxford University Press.

KONSTAN D. (2000), 'Pity and the Law in Greek Theory and Practice', *Dike*, 3, 125−45.

LANNI A. (2004), 'Arguing from "Precedent": Modern Perspectives on Athenian Practice', in E.M. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, 159−71, London: Duckworth.

——— (2006), *Law and Justice in the Courts of Classical Athens*, Cambridge: Cambridge University Press.

McEWAN J. (2002), 'Previous Misconduct at the Crossroads: Which "Way Ahead"?', *Criminal Law Review* 180, 180−91.

MIRHADY D. (2002), 'Athens' Democratic Witnesses', *Phoenix* 56, 255–74.

MUNDAY R. (1997), 'What Constitutes a Good Character?', *Criminal Law Review* 1997, APR, 247−59.

——— (2005), 'What Constitutes "Other Reprehensible Behaviour" under the Bad Character Provisions of the Criminal Justice Act 2003?', *Criminal Law Review* 2005, JAN, 24−43.

OBER J. and STRAUSS B. (1990), 'Drama, Political Rhetoric and the Discourse of Athenian Democracy', in J.J. Winkler and F.I. Zeitlin (eds), *Nothing to Do with Dionysos? Athenian Drama in its Social Context*, Princeton, N.J.: Princeton University Press, 237–70.

PERLMAN S. (1964), 'Quotations from Poetry in Attic Orators of the Fourth Century BCE', *American Journal of Philology* 85 (1964), 155−72.

PORTER J. (2009), 'Rhetoric, Aesthetics, and the Voice', in E. Gunderson (ed.), *The Cambridge Companion to Ancient Rhetoric*, Cambridge: Cambridge University Press, 92−108.

RHODES P.J. (1981), *A Commentary on the Aristotelian Athenaion Politeia*, Oxford: Clarendon Press.

RUBINSTEIN L. (2000), *Litigation and Co-operation: The Use of Supporting Speakers in the Courts of Classical Athens*, Stuttgart: F. Steiner Verlag. (Historia Einzelschriften; vol. 147).

——— (2005), 'Main Litigants and Witnesses in the Athenian Courts: Procedural Variations', in M. Gagarin and R. Wallace (eds), *Symposion 2001: Vorträge zur griechischen und hellenistischen Rechtsgeschichte.* Vienna: Verlag der Österreichischen Akademie der Wissenschaften, (Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte; vol. 16), 99−120.

SCAFURO A.C. (1994), 'Witnessing and False Witnessing: Proving Citizenship and Kin Identity in Fourth-Century Athens', in A. Boegehold and A. Scafuro (eds), *Athenian Identity and Civic Ideology*, Baltimore; London: Johns Hopkins University Press, 156−98.

——— (1997), *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy*, Cambridge: Cambridge University Press.

SPATHARAS D. (2011), 'Self-Praise and Envy: From Rhetoric to the Athenian Courts', *Arethusa*, Volume 44, Number 2, Spring 2011, 199−219.

STEEL C. (2009), 'Divisions of Speech', in E. Gunderson (ed.), *The Cambridge Companion to Ancient Rhetoric*, Cambridge: Cambridge University Press, 77−91.

THÜR G. (2005), 'The Role of the Witness in Athenian Law', in M. Gagarin and D. Cohen (eds), *The Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press, 146−69.

TODD S.C. (1990a), 'Law, Society, and Athens', in P. Cartledge, P. Millett and S. Todd (eds), *Nomos: Essays in Athenian Law, Politics and Society*, Cambridge: Cambridge University Press, 1−18.

——— (1990b), 'The Purpose of Evidence in Athenian Courts', in P. Cartledge, P. Millett and S. Todd (eds), *Nomos: Essays in Athenian Law, Politics and Society*, Cambridge: Cambridge University Press,1, 9−39.

——— (2008), *A Commentary on Lysias, Speeches 1–11*, New York: Oxford University Press.

WOHL V. (2009) 'Rhetoric of the Athenian Citizen', in E. Gunderson (ed.), *The Cambridge Companion to Ancient Rhetoric*, Cambridge: Cambridge University Press, 162−77.

5 Greek perceptions of 'personality' applied in the Athenian courts

In the previous chapters I have highlighted the problems and controversies surrounding the modern reception and interpretation of the wide use of character evidence in the courts of classical Athens. Chapter 1 presented a holistic view of argumentation from character since the age of Homer. The wide invocation of character evidence is not a peculiar feature of the Athenian courts nor is it to be found only in fourth-century sources. On the contrary, its wide presence from Homer onwards, in both judicial and other contexts, calls for a magnification of perspective in order to give a universal explanation for this attitude. Chapter 2 confined the perspective to the Athenian legal system, focusing on the factors that provided formal incentives for Athenian litigants to resort to a wide use of character evidence. The mere presence of such formal enticements in the judicial context calls for a plausible exegesis. Chapter 3 proposed that the rationale behind the wide argumentation from character is to be found in the relevant Greek ideas of 'character'. The conclusions offered in this chapter were applied in Chapter 4 which offers the ways and methods for providing character evidence. The Greek ideas of 'character' called for (and caused) a wide invocation of character evidence, especially in the form of several characteristic past acts. The current chapter completes the explanation of this practice by examining the Greek ideas of 'personality'.

The issues of 'personality' and 'personhood' are problematic since controversy persists as to the particular definitions and uses of these words.[1] As will be shown, ancient models of the 'person' differ significantly from the prevalent modern theories. However, latest trends in the philosophy of mind and ethics reveal a shift to the ancient ones, as providing a more plausible model. These theories are not just abstract philosophical enquiries. They deeply penetrate the 'collective mind' and form what could be described as 'common perceptions of "personality"'. As a result, 'human beings' or 'individuals' whose ideas of their 'selves' are influenced by the mere fact that they find themselves surrounded by predefined structures (e.g. the modern state), gradually internalise the prevalent opinions of their groups. Thereafter, these assumptions influence every aspect of public and private life, such as art, politics and ethics. As a matter of fact, rules of relevance and argumentation in courts have also been substantially influenced by modern ideas of 'personality' and 'human motivation', restricting the use of character evidence as far as possible. This important interrelation of philosophical or popular ideas with

the practice of the courts ought not to be neglected in any discussion of the issue of relevance.

In what follows, modern and ancient philosophical models of 'personality' will be compared, applying the latter to the context of Athenian courts. First, building on the work of modern scholars who study the ancient ideas of the human mind and its functions, we will discover the Greek mode of thinking, decision making, and acting. The application of these ideas in the context of the Athenian courts will explain the litigants' practices and reveal an underlying (maybe only partly conscious) rationale for the wide use of character evidence. Furthermore, such an effort will allow the objective evaluation of the relevance of such argumentation in Athenian courts, always by reference to their own standards and perceptions. Second, the enquiry will proceed by contrasting modern and ancient philosophies of ethics, illuminating litigants' ethical motivation as presented in their speeches. This will allow an assessment of their arguments and provide us with an appropriate model for the interpretation of problematic cases (e.g. the invocation of liturgies). The study of ancient 'personality' will be permeated with the division between 'shame-culture' and 'guilt-culture' and its implications.

Models of the human mind: action-theory and practical reasoning

In what follows, examination will be offered of the approach to human action of modern philosophers of the mind, and comparison will be made with those of the Greeks. Christopher Gill, in his seminal work on Greek 'personality',[2] building on the work of modern thinkers, offers a plausible model of interpretation of Greek action-theory. According to him, the preponderate Cartesian model of the human mind, for which mental processes and actions derive from a single source of consciousness (a unitary 'I'), can prove misleading when applied to ancient Greek psychology. Contemporary thinkers[3] question the Cartesian model as being overly 'subjective', replacing it with a more appropriate model which understands human action in 'objective' (non-subject-centred) terms.[4] For instance, human action can be interpreted as motivated by reasons and reasoning rather than by conscious acts of will.[5] Following such an approach, Greek psychology and perception of human motivation can be best understood and evaluated on their own terms, rejecting the misleading and, until recently, very influential developmental accounts that evaluated Greek examples of human action by reference to Cartesian and post-Cartesian ones.[6]

Contemporary action-theory, in relation to Greek ideas, accepts that an agent's reasons for a given action provide a plausible causal explanation for that action.[7] These reasons include experiences, memories, beliefs and desires. An agent's reasons for acting illuminate the causes which produce that action and can be best understood in objective (third-person) modes of enquiry. As a result, prominent modern notions such as a person's (as a unified locus of self-consciousness) 'autonomy of the will' in every single instance of his life are challenged. Such 'objectivist' trends find their precursors in Greek literature and philosophy, either

in Homeric psychology or in Aristotle's account of the 'practical syllogism'. In this light, human action is presented as following a process of logical reasoning, whose stages express the human being's beliefs and desires which finally cause that action. This kind of practical syllogism has its roots in the 'crucial mark of human rationality', namely 'the ability to conceptualise (to structure one's responses in terms of universal concepts), and – a capacity implied by conceptualisation – the ability to *reason*, to make inferences and draw conclusions'.[8]

Inferential reasoning, as a source of human action, can be divided into 'means-end' type and 'rule-case' type. In both cases the agent decides the 'end' to be attained by reference to his beliefs and desires. In the first type of reasoning, the action is directed 'through the possible', by evaluating the efficacy and difficulty of available means for achieving that 'end'. In the second type of reasoning, the present case is placed into a general class. The agent deduces the appropriate mode of action from a preconceived set of actions that form the 'rule' which according to his experiences or perceptions can achieve that 'end'. To use a Homeric example, Odysseus (without considering the available means) applies to his own case the general principle that 'whoever is to be best in battle must stand his ground strongly' (*Il*. 11.409–10).[9] Both types of reasoning have significant implications for how others perceive and evaluate a person's actions. The fact that human action is determined by reference to a person's experiences and presuppositions (in the form of the beliefs used for reasoning and the ways of forming desires) and exhibits the sense of time (the ability to weigh the advantages of future courses of action, and the sense of one's own past),[10] has equally important implications, especially (as will be demonstrated) in a courtroom. For instance, past acts acquire an exceptionally predictive (and probative) force since (after a process of conceptualisation) they may expose a human's characteristic beliefs and desires. Also, a person can be judged for forming these beliefs and having these characteristic desires.

Patterns of behaviour may be abstracted in order to uncover the person's internalised beliefs and typical desires that direct his action. As a result, jurors find it easier to infer the usual 'ends' that a particular litigant pursues and the usual 'means' by which he attains them, i.e. his characteristic 'practical syllogism'. In other words, 'rule-case' and 'means-end' reasoning can uncover (or attribute) motivation and, assessing the alleged facts in light of litigants' characteristic conduct, make the reconstruction of the 'true facts' more probable.

The above considerations are negated by the modern (Cartesian and post-Cartesian) conception of the human mind. In accordance with this model, the interpretation of human action as the independent decision, detached from the ethical environment, of a self-conscious subject whose 'autonomy of the will' in every single instance of his life is recognised, automatically diminishes character's probative value. Past acts can no more serve as possible indicators of future behaviour (in the form that has been described above) and each act is independent and cut off from the rest (dissociated from the agent's 'characteristic' reasoning). In the context of the courts in particular, this Cartesian preconception of human action and motivation has banished as irrelevant any reference to litigants' previous conduct, only allowing small room for previous offences of the same type. The above

discussion of the distinctive ancient and modern models and their implications for relevance proves that conclusions as to the 'liberality' or 'strictness' of notions of relevance may be totally misleading and unwarranted, especially when not specifying the normative model of interpretation and the reasons for its application. The following examples illustrate the appropriateness of the 'objective' model of human motivation regarding the Athenian court speeches, allowing a more plausible interpretation of their content.

The model applied to forensic speeches

In order to prove the suitability of this model in interpreting forensic speeches it will be applied to divergent cases, which are spread through time and involve different types of charges. The analysis will begin with Antiphon's First Tetralogy. This is a model speech, not delivered in court, which exemplifies modes of argumentation based on probability. In Antiphon's First Tetralogy the facts are in dispute, the only undeniable being the discovery of two murdered men (a master and a slave) in a dark street of Athens. The only evidence is the late slave's oral testimony shortly before he died, whereby he allegedly recognised the defendant as their murderer. Based on arguments from probability, potential motives are examined in order to prove the guilt or the innocence of the defendant.

The prosecutor aims to prove a motive for the defendant. In order to ascribe it he follows the model of human motivation described above. Based on objective reasons for reasoning and on the stereotypical beliefs of the audience, he tries to '*impose a plausible end*' that the defendant sought. According to his arguments and by reference to 'rule-cases', no other man had any motive in killing these people (Antiph. 2.1.4). Why not? Common criminals are not likely to have killed the men since their 'end' would be to steal their cloaks. Yet the cloaks were still at the site of the murders. Neither was the killer drunk, since he would have been identified by his fellow drinkers. Referring to similar rule-cases the prosecutor concludes that no one but the defendant had a motive to kill them. The 'end' imposed on him was to avoid further prosecution by the victim (after he had been recently indicted by him and convicted). So, after rendering unattainable all the other available 'means' of achieving this 'end', the only means left was murder. Therefore, the prosecutor, by reference to rule-case type reasoning, excluded all the other candidates and – by inference − imputed a motive to the defendant. By reference to the background of the case (previous convictions and certainty of further prosecution) he consolidates the presence of this 'end' and excludes all other available 'means' of achieving it,[11] apart from the one that solves the case: murder.

The defendant, on the other hand, rejects the prosecutor's arguments by reference to the same types of reasoning. First, through a 'means-end' type, he questions the very 'means' of achieving the 'end' imposed on him by the prosecutor, taking as valid the hypothesis that this 'end' is true. In accordance with Aristotle's 'practical syllogism' he states that even if he wanted the victims dead, there were *easier* and *safer* means of achieving it, such as not being present at the site of the murder (Antiph. 2.2.8). As a result, even if the 'end' was valid, the prosecutor's

allegation that no other 'means' were available collapses. Then, the defendant questions the imposed 'end' per se (Antiph. 2.2.9), stating that he would prefer to live without property (after a possible further conviction) than be executed (as a penalty for murder). In order to prove this (namely the rejection of motive by denying the 'end') he resorts to character evidence. By reference to the 'rule', he maintains that his past acts (liturgies, loans to friends, performance of sacrifices and obedience to laws etc.) prove the virtue of his character, making him – by inference – an unlikely candidate for this kind of conduct. In his words: 'That's the way I am, so don't convict me of anything unholy or disgraceful' (Antiph. 2.2.12).[12]

In the concluding speeches, the prosecutor silences the character aspect of his opponent's speech, insisting on the presence of motive by re-emphasising a 'rule-case' type of human action: the defendant's prosperity is not an indication of his innocence; on the contrary 'fear of losing this prosperity makes it likely that he committed this unholy murder' (Antiph. 2.3.8). Furthermore, he insists that on the balance of probabilities, homicide was the easiest available 'means' for the defendant to achieve his 'end'. The defendant replies by reference – again − to 'rule-cases' (Antiph. 2.4.5, 8ff.) insisting on his character and on his social role, stating that rich men do not look for trouble (2.4.9).

The aforementioned method of argumentation has significant implications. First, it shows that references to the background of the case do not extend the scope of the legal case but illuminate arguments referring to the particular charge. Here, such references sought to establish a likely motive, making more probable the attribution of an 'end' to the opponent.[13] If human motivation is based on reasons and reasoning, then plausible reasons must be adduced in order to impose on the opponent a believable 'end' (that was to be achieved by the deed that triggered the legal dispute). Second, inferential reasoning by the jurors could take two forms, which I call 'external rule-case' type and 'internal rule-case' type, based on their experiences and stereotypical presuppositions. The 'external rule-case' type, bearing on issues of status, class or social role takes the form of 'Rich men do not fight in dark streets – He is a rich man – He did not fight', whereas the 'internal rule-case' type, refers to a person's character and takes the form 'His past acts show that he is a decent man – Decent men do not commit this type of act – He did not commit that act'. Litigants utilise both forms of rule-type reasoning by reference to character evidence. Finally, this model has important implications as to a 'means-end' type. Once an 'end' seems probable, the inspector has to question and evaluate divergent courses of actions to achieve it (i.e. the 'means'). Thus a litigant in such an adversarial context will try to impose an 'end' on the opponent (this 'end' being legal/ethical or illegal/unethical per se) and then reject all the available 'means' of achieving it, apart from the one which solves the particular legal case.

The above considerations highlight the importance and the relevance of character in inferring or attributing motivation and action, especially in relation to the *particular act* which generated litigation.[14] Therefore, in such uncertain factual circumstances, the objective consideration of human action by reference to a person's characteristic beliefs and desires (as exposed by past acts) and – by induction − to

his character, aims at answering (sometimes in terms of probability) the question: 'Did the defendant actually commit the illegal act'?

After exemplifying the framework and the model by reference to Antiphon's First Tetralogy, real court speeches and divergent types of legal cases may be examined. Lysias 4 is a defence speech presented before the Areopagus on a (possibly private) charge of premeditated wounding.[15] The prosecutor has placed an 'imposed end' of homicide on the defendant (Lys. 4.5), that seems logical by reference to the background of the dispute. To establish the defendant's motive, particular reference is made to their enmity and former disputes arising from a process of *antidosis*. The defendant, following the pattern of questioning the available 'means' of reaching the imposed (by the adversary) 'end', concludes that if 'premeditated wounding' was actually what he looked for, he would have already carefully planned the alleged plot by taking a weapon with him. The fact that he had not done so, proves the inaccuracy of his opponent's argumentation. What is different from Antiphon's First Tetralogy (and forms a pattern as will be proved) is reversing the focus by questioning the prosecutor's motive in bringing the charge. Defendants thus seek to impose an illegal or unethical 'end' on prosecutors, such as sycophancy, in an entirely symmetrical form of argumentation. Without the need for proof as to the 'means' that the prosecutor used (since the 'means' used was the litigation per se), defendants try to replace the alleged 'end' of achieving 'justice'[16] by imposing on the prosecutors a less noble (or unethical) one.

This is consistent with our model of human action since, with the 'means' (i.e. prosecution) being already present, the inspector should discover the 'ends'. If the 'ends' were indeed 'justice' and 'legality' and remained undisputed by the defendant, then the prosecution automatically becomes valid, diminishing the possibilities of the defendant's innocence. On the other hand, if the 'end' of the proceedings is questioned and replaced by a condemnable one, the prosecution in all probability becomes frivolous. In this particular case therefore, the defendant argues that the prosecutor initiated this false prosecution in order to avoid paying the amount owed and to retain a woman who was possibly to be exchanged as well in the *antidosis* (Lys. 4.8). The background to the dispute illuminated the prosecutor's motivation as well. In this all-or-nothing adversarial legal dispute, both parties' motivations and actions are at stake. Nonetheless, at the centre of every argument stand the facts that triggered the particular legal case. The jurors had to decide as to which party's interpretation of the events was closer to the truth.

Lysias 5 (For Callias), regardless of its brevity, further illuminates the issue. Referring to an 'external rule-case', by implication of the testifiers' social role and status as slaves, the speaker imposes on them an 'end' to be achieved (namely, to be released) by the wrongful 'means' of false witnessing. Their status and the circumstances make the use of *inappropriate* 'means' for an illegitimate 'end' more probable. In Lysias 7 the defendant in a case (*graphe*) of impiety (uprooting a sacred olive-stump) disputes *both* the 'end' imposed on him as implausible *and* the 'means' of achieving that 'end'. Stating that he was not compelled by poverty to venture on such an act, or that the plot was declining in value while the stump existed (Lys. 7.14) he finds no plausible 'end' that could have motivated him.

Furthermore, by reference to his positive characteristics (his great regard for his native land and for sacred olives, his lavish spending on liturgies and trierarchies etc.), he insists that such a deed does not coincide with a man of his sort (Lys. 7.25, 31, 41). On the other hand, even if the 'end' was plausible, easier 'means' of achieving it were possible (7.15, 24) especially for a man of his intelligence (7.12). Contrastingly, the opponent's 'end' was not the attainment of 'justice'. This is proved by the fact that although the defendant provided him with all 'means' possible for attaining this 'end', the prosecutor rejected them and insisted on his false prosecution (Lys. 7.34).[17] Therefore, since the prosecutor's 'end' was not justice, another 'end' has to be found. As usual, the imposed 'end' for a false prosecution is money (Lys. 7.39), and the exegesis offered for its initiation is that this was the only 'means' available for reaching this 'end' (7.40).

In Demosthenes 53, Apollodorus, the plaintiff of an *apographe*, denies any improper motive, such as sycophancy, for initiating this suit and replaces it (by reference to the background of the dispute) with the more plausible and noble 'ends' of revenge in accordance with justice. The 'means' available for taking this revenge was the initiation of the current *apographe*, in accordance with law. In Lycurgus 1, the prosecutor of an *eisangelia for treason* rejects the opponent's alleged 'end' of leaving Athens for trade (Lyc. 1.55) by reference to the 'means' he used (Lyc. 18ff.). By reference to 'external rule-cases' he compares the 'means' that tradesmen use when departing, with the uncommon ones used by the defendant.[18] These 'means' and his character (as proved by Leocrates' past acts) prove the 'end' of treason. In Lysias 16, the defendant of a *dokimasia*, who is accused for collaboration with the Thirty, rejects any motive on his part for such conduct. His past acts conceptualised reveal an egalitarian and *philopolis* character, wholeheartedly adhering to the polis' democratic norms ('internal rule-case'; Lys. 16.10ff.). He also rejects the 'external rule-case' of judging by his appearance and imposing oligarchic affiliations from the mere fact that a man grows his hair long (Lys. 16.18−20). As a result, no collaboration with the Thirty should be attributed to him.

The above patterns of argumentation are followed in *dikai* as well, on the part of both the prosecution and the defence. Demosthenes 54 (*Against Conon*) is a prosecution speech in a *dike aikeias* (private prosecution for assault). The background to the particular assault that generated the proceedings illuminates the opponents' characters and (as a result) their motives. The violent and hubristic behaviour of the opponents (54.3−6), reveals a characteristic pattern of practical syllogism ('internal rule-case' type). The alleged tension between the parties established a motive for an unprovoked attack (this was the opponents' usual 'means' of achieving their 'ends' as presented by the speaker). The 'end' as portrayed in the assaulter's conduct was the violent humiliation of the victim (54.9). On the other hand, the defendants would reject such a motive and would downgrade the case to a usual (rule-case) violent brawl between youngsters (54.14ff.). This is rejected by the prosecutor by reference both to their own good character (being incapable of such deeds, and achieving the 'end' of justice by legal and mild 'means' 54.15−6, 24)[19] and to the opponents' (distinguishing them, especially the 'father' Conon, from the 'external rule-case' usual 'brawls between youngsters' 54.22−4).

After establishing the true facts of the case, the prosecutor rejects the opponent's alleged challenges and proves the falsity of the defendant's witness testimonies. Starting with the first, the prosecutor rejects the allegation that the defendant asked for the slaves to be tortured by exposing the fallaciousness of their 'means' (54.30). The fact that the challenge was issued too late, missing many opportunities hitherto, demonstrates that the true 'end' of their challenge was to delay the main trial. This is supported by reference to their usual practical reasoning, since they had employed such delaying tactics in the past (54.26, 29). The second issue involves the rejection of Conon's oath-taking challenge. The speaker, revealing Conon's character by reference to his past acts, proves the spuriousness of his oaths (54.39–40). Finally, in dealing with the falsity of the witness' testimonies, the speaker refers to 'rule cases'. First, by reference to an 'external rule-case', partisan witnesses should not be afforded the same credibility as neutral ones (54.32ff.). Second, the prosecutor proceeds to an 'internal rule-case' type of reasoning, exposing the particular witnesses' unreliable character, thus making them probable candidates for perjury (54.34ff.).

In Demosthenes 47 the prosecutor in a *dike pseudomarturion* argues that the opponents used illegal and violent 'means' in accordance with their character and past acts, their 'end' being the avoidance of the current trial which would expose their lies and serve as aggravating evidence for the original trial.[20] In Demosthenes 55, the speech comes from a defendant in a *dike blabes* (private suit for damages). The prosecutor alleges that the defendant's building of a wall inhibiting drainage caused his property to flood after a heavy storm. Again, the background to the dispute illuminates the particular case by exposing the motive of the prosecutor in bringing a false charge, making the imposed (by the defendant) 'end' more probable. The opponent's past acts reveal the desire of the prosecutor to take by any means the defendant's property (55.1–2). The previous inaction of the prosecutor through the course of many years (55.4–7) reveals that the defendant had not committed any illegal or inappropriate deed. This omission, coupled with the fact that he did not suffer any significant damage (52.21–2), excludes the 'end' of justice, replacing it with the 'end' of misappropriating his property. The 'means' for achieving it is the current false prosecution.

To recap, in accordance with the Greek model of practical reasoning (and modern action-theory), character in Athenian courts is invoked to illuminate the motives for committing the actionable deed (defendant) or initiating the prosecution (prosecutor). In the light of a person's character as revealed by his past acts, this motive may be exposed by questioning (and usually imposing) the 'end' to be achieved and by evaluating the 'means' by which this 'end' was sought. Character also reinforces stereotypical presuppositions by reference to 'rule-cases'. According to this type of reasoning, the person (his character traits, his status, or his action) is placed in a more general category, making the existence of a motive more or less probable by reference to the 'rule'. This interpretation of character evidence in Athenian courts (a person's past acts, his characteristic practical syllogism, and the background to the dispute) are directly relevant to the legal case and are invoked to illuminate the particular facts which trigger the charge.[21] Jurors

were not asked to give their verdicts on litigants' characters but litigants' characters illuminated the facts of the legal case as these were specified in the written plaint.[22]

The impact of the verdict as a supplementary reason for reasoning

The Greek model of practical reasoning sheds light on yet another problematic feature of Athenian courts, namely the numerous references to the impact of a verdict. These references provide a supplementary reason for reaching a verdict and could take three forms: impact on the jurors, impact on the litigants, and impact on the polis. However, it is of utmost importance that such references were *always* coupled with justice (in the strict legal sense). Litigants, having proved the justice of their case, strengthened their argumentation by reference to further reasons which (when correctly interpreted) would emphasise the justice of their case.

To begin then, we may examine litigants' (especially defendants') references to the harsh impact of an adverse verdict.[23] Appeals to pity were not uncommon in Athenian courtrooms, sometimes being supplemented by (actual or verbal) simulation of supplication.[24] Johnstone (1999) has extracted a pattern from this practice, finding that such appeals were adduced in cases of a real threat to the *oikos* of the defendant as a result of the jurors' verdict. This unjust threat is aggravated by the defendant's innocence, standing in contrast to the services that this particular *oikos* has offered to the polis.[25] Following a similar rationale, questions of proportionality may come into play.[26] Of particular importance is the fact that such appeals to pity are not received as inhibiting the rational judgment of the jurors. Contrariwise, they serve to reinforce and assist it. Appeals to pity *presuppose the defendant's innocence* and are always adduced in order to highlight the *undeserved suffering* of the defendant (and as a result of his *oikos*), giving the jurors yet another valid reason for his acquittal.[27]

In addition to the personal impact of an adverse verdict, references to its consequences on the polis at large were not uncommon. Even in present times, judges and juries think about the political cost of a decision and many times try to convey their verdicts in accordance with public policy.[28] However, the Athenians seem to have placed more emphasis on such considerations, taking into account the relative instability and (alleged) insecurity of the polis and its constitution.[29] Again, arguments about public impact are always adduced to reinforce the legality of a litigant's case.[30] Good management of their property, securing future material contribution to the polis, is a well-attested pattern of forensic speeches.[31] Likewise, non-pecuniary considerations could be brought forward[32] and especially the impact that a verdict would have on the life of the polis, as a sign of approval or disapproval of behaviour. Verdicts would become known and be circulated throughout the polis or, in some occasions for high profile cases, throughout the Greek world. Therefore, litigants tried to persuade the jurors that voting for their case would have an educational impact on the whole city and especially on the youth.[33] Conversely, a verdict could have an adverse impact on the legal system and the courts in particular if, for example, a sycophant's prosecution would be upheld. This would open the floodgates to similar false prosecutions.

Finally, references to the impact of the verdict on jurors (personally, not as representatives of the polis) complete the picture. Jurors are frequently reminded to vote in accordance with the law, especially by reference to the Heliastic oath.[34] Although many restrictions[35] limited the jurors' discretion as to whether they should apply the letter of the law in their decisions, their informality jeopardised their effectiveness. Still, the fact that no Athenian litigant asks them (even implicitly) to disregard the law and give precedence to other considerations, and the fact that no defendant admits his guilt and expresses remorse (by offering, again, extraneous reasons and benefits as a recompense and incentive for lenient treatment), are significant indicators that cases were decided in accordance with the law.[36] Furthermore, jurors were reminded of the social sanctions that an allegedly illegal verdict would produce, referring especially to the shame they would incur when facing their families.[37]

To conclude then, problematic (and at first glance irrelevant) references to the impact of the verdict may be interpreted in light of the Greek model of human motivation as incentives for further reasoning emphasising the proper outcome to the particular legal case. Litigants present themselves as 'adherents' of the community's values, obeying its norms, seeking common 'ends' and having mutual interests with the jurors. The 'end' of achieving legal justice in a particular case is the most important reason influencing the jurors' reasoning for reaching their verdict. In conformity with this reason, other supplementary ones were offered in order to strengthen a litigant's case and convince the jurors that their decision promotes the common interest. Although a defendant's innocence in a particular case would be enough to convince the jurors to vote for acquittal (in accordance with their oath), this is highlighted by reference to undeserved and disproportionate suffering and / or (past and future) services to the community. The common 'end' is the implementation of justice in both its legal and its wider meaning (since these were *identical* in the forensic speeches) and the 'means' to achieve this is the appropriate verdict. Such an outcome serves the interests of the jurors (in keeping their oath and implementing justice 'in accordance with the laws'), of the polis (in a utilitarian and an ethical sense), and of the speaker (avoiding the 'unmerited suffering'). As a result, in accordance with the Greek model of practical reasoning, references to the impact of a verdict (which always coincided with legal justice) comply with legal argumentation and offer fitting (secondary) reasons for reasoning, without – in principle − obstructing rational and impartial judgment.[38]

'Participant' personality and ethical motivation

In the preceding section it has been demonstrated how human action may be interpreted in 'objective' terms. That is, a person's experiences, beliefs and desires provide the reasons for reasoning which generate human action. This model is diametrically opposed to the modern 'subjective' view of human action which is based on the Cartesian philosophy of mind. In a similar vein, ancient ethical motivation differs from the modern Kantian and post-Kantian model. Gill, based

on the works of Williams and MacIntyre, develops his model of the 'ancient self' which is described as 'objective-participant' (as opposed to the modern 'subjective-individualist'). The Kantian model presupposes that moral life is grounded in a distinctive individualistic stance adopted by the moral agent. A key example of this idea 'is Kant's thesis that the moral response involves, or implies, an act of "autonomy", or self-legislation, by which the individual agent binds himself to universal principles'.[39] This fundamentally 'individual-centred' approach prescribes that 'only the individual herself (the possessor of a uniquely subjective viewpoint) can determine the validity of the rules that she legislates for herself'.[40] Such a 'person' exercises her capacity for autonomy by establishing moral principles for herself, in a process that involves 'abstraction from localised interpersonal and communal attachments and from the emotions and desires associated with these'.[41]

This kind of moral 'autonomy', coupled with the 'autonomy of the will' presupposed for every single instance of a person's life, may have implications for a legal system and its courts. Legal enactments may be viewed as utilitarian expressions of 'positive law' distinct from the ethics of a community. Law, lacking the moral foundation provided by concurrence with the ('critical' or 'conventional') morality of the community, may be received as a useful – though independent − tool for subjecting individuals to the governance of 'positive' rules. Any question concerning ethics might be questioned and ejected from the legal discourse, making meaningless any discussion about the identification of legal with moral norms. The significance of the individual's level of adherence to conventional ethics is thus devalued and the court's function is as an (ideally) autonomous realm. Furthermore, the notion of 'moral autonomy' presupposes the idea that a person's ethical stance should not be evaluated by reference to communal norms, rendering issues of 'merit' based on 'overall personality' meaningless. As a result, evidence from character in modern courts, where it is already considered irrelevant according to the modern 'subjective' model of human action, is further restricted by reference to the agent's 'ethical motivation' as well.

On the other hand, the ancient model of ethical motivation promotes a less 'individual-centred' approach. According to such theories, ethical life should be understood 'primarily in terms of the development of dispositions by wholehearted engagement in the value-bearing practices, roles, and modes of relationship of a specific society'.[42] Based on the idea that human beings are functionally adapted to participate in interpersonal and communal relationships, this ethical life is at the most fundamental level shared rather than individuated. For Williams, ethical knowledge is achieved in a life guided by 'thick' (culturally localised) ethical values rather than by 'thin' (universalised) ones. For MacIntyre in particular, ethical thinking is influenced by a conception of what is required by the social role which each individual inhabits.[43] Thus, in contrast to the Kantian model, the fullest possible (practical and psychological) engagement of the individual with the localised nexus of roles and relationships in which he finds himself, dictates, forms, and transforms the beliefs which produce the desires and ultimately the motivation for human action. The kind of reasons and reasoning taken to motivate a person's

actions cannot be analysed adequately without reference to his engagement with this localised nexus. In other words, the individual agent's actions are based 'on reasons and reasoning informed by the action-guiding beliefs of his community and by his engagement with his social role'.[44] These, in turn, are effectuated and publicised by these actions.

This analysis brings out the essence of the different approaches to ethical motivation as exemplified by the aforementioned opposing theories. The implications that such divergent approaches have in courts are obvious, though it might be useful to specify them. The ancient 'participant' model of the self presupposes an − as far as possible total − adherence to the communal ethical norms. Any claim to moral 'individualism' or any attachment of the individual to 'universal' norms becomes absurd. As a result, such a moral agent becomes a 'moral outsider' suffering the dreadful (especially for an ancient) penalty of living in isolation. A human being's ethical stance is compared with accepted standards, with his actions and ethical motives being evaluated according to these. Total adherence to these norms presupposes their practical effectuation, signifying a 'worthy', properly motivated social 'participant'. Additionally, if ethical beliefs are taken as directing human action, then a person proving their internalisation (by reference to his previous conduct based on the 'correct ethical beliefs'), renders himself almost incapable of 'unethical action'. Taking into consideration the ancient legal system's identification of 'positive' law with 'ethical' norms (the first following and officialising the second), then the aforementioned 'ethical person' renders himself normally incapable of 'illegal action' as well. The ancient 'participant' ethical model which holds that adherence to the community's proper ethical beliefs directs virtuous (according to this community's standards) action, renders 'character' a central means of evaluating, understanding, and testing human deeds.

In the above analysis, the characteristics of a small-scale agricultural community (applicable to Athens whether it was indeed a 'face-to-face' society or not) or a 'shame-culture' should be taken into account. There is no need here to enter into a detailed examination of the different approaches and (alleged) distinctions offered by scholars between 'shame-cultures' and 'guilt-cultures'.[45] It has been convincingly proved that sharp dissimilarities between these are not justified.[46] In ancient Greece (and classical Athens in particular) 'shame' was heaped on the individual agent not merely as an emotive reaction to external sanctions but as the result of self-criticism. Evidence shows that the communal standards of behaviour and the society's ethical norms were *internalised* by the individual agents,[47] carrying with them the related ethical judgments.[48] This process of *internalisation* may be evidenced by reference to the 'internalised other'[49] (a form of conscience, the imaginable figure who expresses society's ethical judgment). Thus a (real or imagined) fear of external sanctions functioning in the conscience of the agent provides the catalyst for incurring the emotion of shame,[50] simultaneously covering much of the ground which differentiates it from 'guilt'.

A characteristic of such societies is emphasis on questions of honour and reputation. Although this difference between 'shame-cultures' and 'guilt-cultures' is not one of kind but of degree (placing more or less emphasis on issues of 'reputation',

'honour', 'face' etc.),[51] the focus shifts from a person's actions and concentrates on the agent. To put it simply, questions such as 'what kind of person one *is*' tend to overshadow questions such as 'what kind of actions this person *does*'.[52] As a result, emphasis is placed on the agent's personality and character, as means of proof and relevant factors to be assessed for the interpretation of his acts.

The relative identification between a citizen and his community in the ancient polis stands in contrast to the modern detachment (and resulting tension) between the individual and the state. In the ancient context, the habitual participation of the person in all the interpersonal nexuses of small-scale subcultures (*oikos*, neighbourhood, demos, phratry, and ultimately polis) signified the affiliation of the individual with these institutions.[53] This attachment to each particular socio-political circle, which creates ethical *adherents* and *outsiders*, ultimately signifies a degree of interdependence between the individual and, for instance, his polis, to the extent that their improvement or deterioration go hand in hand. Any individual act may have a bearing on the unity or disintegration of the community; if this act is based on ethical beliefs and can be predicted by inference from 'character' or 'personality' (i.e. wholehearted adherence to the conventional behavioural norms of the community), then the emphasis put on 'what the person *is*' is justified.

The above outcomes, as drawn from psychology (in the form of the human being's 'participant' personality with its implications for the person's ethical motivation), social anthropology (as the characteristics of a 'shame-culture'), sociology and politics (in the relationship of the individual with surrounding structures, such as the state), need to be considered carefully when examining the use and relevance of character evidence in the courts of law. In what follows, the above models and their results will be applied in the courts of classical Athens.

The 'participant' person in the Athenian courts

In the light of the above analysis of ancient ethical motivation, the following reflections may be offered which categorise the Athenian courtroom speeches' patterns of argumentation (sometimes heavily criticised by modern scholars):

i) Litigants advertised their whole-hearted adherence to communal (conventional) ethical norms.
ii) Legal adversaries compete as to the relative degree of internalisation of these norms.
iii) Litigants compete within a coherent set of ethical norms, endorsed and officialised by the undisputed authority of the laws, and
iv) Litigants observe the behavioural standards required by their social 'role'.

Analysis of these four patterns of argumentation, illustrated by reference to examples from the surviving speeches and linked with the general remarks offered in the previous section, will trigger a new (all-embracing) interpretation of the role of character evidence in Athenian courts.

Whole-hearted adherence to the norms of the polis

The main aim of Athenian litigants was to show that their *characteristic ethical motivation* complied with the norms and principles of their community. Their actions, being guided by the cooperative values of the community, were adduced to earn them complimentary characterisations such as *sophron* (self-controlled), *prothumos* (eager to serve the polis), and *ennomos* (law-abiding). At the same time, they aimed at proving their respect for the proper forms of social interaction such as *philia*. As a result, an Athenian litigant whose past acts proved a high degree of internalisation of the coherent, unquestioned set of communal ethical norms, was an *ethical adherent* of the community and, by inference, a person incapable of performing illegal, anti-social acts.

There is no need to dwell extensively on the definition and content of these norms since this theme has been treated many times by respected scholars.[54] What is needed is to focus on the cooperative character of the majority of the norms adduced in Athenian courts. This proves that the Athenian courts were not arenas for competition through an arbitrary measurement of honour and status. Virtuous past acts verified authentic internalisation of social norms leading in turn to honest, proper, cooperative citizen conduct. Appropriate ethical beliefs caused analogous, appropriate desires. The citizen who had internalised and exhibited these cooperative virtues was unlikely to have committed an unethical or illegal act. Hence, the publicised adherence to conventional ethics and the accomplishment of public services were taken as means of proof for the particular legal case.

SOPHROSYNE OR ANTISOCIAL BEHAVIOUR? – HUBRIS AND INDECENCY

Sophrosyne (moderation, self-restraint), the ultimate cooperative virtue of the polis,[55] could be presented in numerous forms, having a bearing on the person's behaviour in the private sphere, in social interaction and in the courts.[56] In the context of the law courts, as Rademaker observes, a claim of *sophrosyne* could be made both *ad rem*, to prove that a speaker is guilty or innocent of certain types of aggression, and *extra causam*, to suggest that he is generally capable or incapable of injustice.[57]

In Demosthenes 21, the famous statesman tries to prove his rival choregus Meidias' hubristic behaviour, which culminated in his assault during the religious festival of the Great Dionysia. Meidias' past acts[58] reveal his inherent antisocial and antidemocratic stance which achieved the status of a character trait. Rejecting any argument that the insolent aristocrat acted 'out of character', swept away by anger, he asserts that Meidias 'is detected in a continuous course of law-breaking, spread over many days; surely this is far from a mere fit of anger and he stands convicted of a deliberate policy of insult' (Dem. 21.41−2). This is further proved by the evaluation of Meidias' public-spiritedness by reference to his liturgies. Without objecting to the validity of such an evaluation, Demosthenes asserts that the polis has not been given a proper share of Meidias' riches which he used totally for his haughty showing off (Dem. 21.158).[59] His behaviour makes him a social

and ethical outsider of the polis, a 'common enemy of the state' (21.142).[60] *Mutatis mutandis*, his hubristic act in the particular case should be punished.

In Demosthenes 53, the usual ethical motivation of the opponents (i.e. contempt for the ethical norms of the community), as presented by their past acts, illuminates the present case of false witness as well as the original case *dike aikeias*.[61] In all likelihood, their characteristic ethical motivation proves the current allegations as to their disrespect for the laws, and efforts to inhibit justice. Their character illuminates the present case. In Demosthenes 54, the assaulters' antisocial behaviour, as expressed by their brutality and violence, has put the prosecutor in a position to shrink from even narrating their abusive language and deeds. Apart from a rhetorical trick (as discussed in Chapter 4), his silence may reveal a *sophron* character. Being in ethical concord with the jurors, his high degree of internalisation of the communal norms makes him believe that even the citation of his adversaries' unethical deeds could bring shame.[62]

Aeschines, the rigorous patriot, presents himself as the protector of the communal ethical norms of decency.[63] He repeatedly characterises his main target, Demosthenes, as an effeminate pervert, squanderer of his patrimony, and unprincipled in every possible way.[64] Demosthenes' non-adherence to the virtuous ethical norms of the polis is best exemplified by his outrageous behaviour after the death of his daughter. Demosthenes was presented as the man who perjured himself on every occasion and perverted the burial rites of his own daughter.[65] A man of his character is definitely unworthy of being crowned by the Athenians for his services.

Andokides, answers one of the main charges (placing a suppliant's bough on the altar during the Mysteries) by reference to his opponent's moral character. He asserts that Callias, a member of the Kerukes, did not hesitate to commit impiety in order to trap Andokides. His other deeds prove his moral baseness: he did not refrain from establishing sexual relationships with a mother and daughter (despite being himself a priest of the Mother and the Daughter, namely Demeter and Persephone), he perjured himself at the Apaturia, and destroyed his own family.[66]

In Lysias' speeches allegations of disregard for communal ethical norms are also present, proving the pattern of argumentation by reference to the litigants' reactions as to the set of communal norms.[67] On the other hand, adherence to the ethical norms of the community is invoked to receive credit, making the person an ethical companion, truthful and law-abiding, who deserves to be treated by the court accordingly.

CITIZEN AND DEMOCRAT

In Demosthenes 22, Androtion's behaviour is characterised as undemocratic, lawless and tyrannical, surpassing in violence even the deeds of the Thirty (Dem. 22.49−54). His characteristic disrespect for the laws of the polis are presented as the 'beliefs-reasons' on which the opponent's reasoning was based in order to make the unconstitutional proposal for which he is prosecuted. His non-adherence to the ethics of the polis transformed him into an unrestrained and vicious figure.[68] The illegal proposal was merely the culmination of such a person's acts. As stated

in Demosthenes 24, such ethical outsiders do not deserve to bear the fruits of the polis' noble morals.[69]

The opponents' conduct could also be contrasted to the Athenian national character (*τῆς πόλεως ἦθος*), in order to prove the non-adherence of this person to the communal norms:

> [. . .] truthful, honest, and, where money is concerned, not asking what pays best, but what is the honourable thing to do. But as to the character of the proposer of this law, I have no further knowledge of him, nor do I say or know anything to his prejudice; but if I may judge from his law, I detect a character very far removed from what I have described (Dem. 20.13).

Bribery and corruption (in opposition to the *ἦθος* of the polis) are regularly invoked as improper motives caused by the adversary's moral failure.[70] In accordance with our model, an act must be explained by reference to the agent's beliefs. Reprehensible acts prove the agent's non-adherence to the norms of the polis and this factor becomes decisive in attributing motive to a deed in question.[71] The defective character trait remains present and the characteristic defective ethical motivation as well. This is exemplified by reference to Timocrates' character on a prosecution speech in a *graphe paranomon*:

> Yet from what gain do you think that such a man would restrain his hand or what would he hesitate to do for lucre's sake, when he did not disdain to legislate in contradiction of himself, though the laws forbid contradiction even of others? It seems to me that, so far as effrontery (*ἀναιδείας*) goes, such a man is ready to do anything (Dem. 24.65).[72]

Similar accusations referring to the (abstracted) character of the defendant, whose traits oppose Athenian ethical values, further illustrate the case:

> For what fatal or dangerous act will he shrink from, men of Athens—this polluted wretch, infected with hereditary hatred of democracy? What other man would sooner overthrow the State, if only—which Heaven forbid!—he should gain the power? Do you not see that his character and his policy are not guided by reason or by self-respect (*αἰδὼς*), but by recklessness? Or rather, his policy is sheer recklessness. Now that is the very worst quality for its possessor, terribly dangerous for everyone else, and for the State intolerable (Dem. 25.32).

A litigant's unpretentious respect or lofty contempt for the laws revealed his typical attitude towards the polis and the democratic constitution.[73] Past conduct proving a characteristic disregard of the laws and the court judgments is a common accusation to be found in Athenian courts.[74] In contrast, absence of criminal convictions or infrequent inhabitation of the courtrooms was adduced as positive evidence for a person's general adherence to the laws.[75] This latter plea was a rhetorical *topos* of prosecutors (usually to be found in the prologue) to refute

accusations of sycophancy.[76] Being a *philopolis* demanded positive acts of proof,[77] egalitarian attitudes,[78] and wholehearted adherence to the communal customs.[79] Sometimes this could be said to cause the envy of grudging fellow countrymen.[80] Although it should not be taken at face value, the strength of Euphiletus' assertion in identifying himself with the law (his hand becoming the weapon that enforced justice)[81] is indicative of his complete devotion.

The most explicit way of proving unequivocal loyalty to the polis was military service. This was the most informative opportunity to sacrifice self-interest for the common good and demonstrate adherence to the ideology of the community. Serving the polis in one's own person revealed total commitment and complete adherence to its ethical and heroic values.[82] Heroism and excellence were honoured and rewarded, whereas cowardice and draft-evasion were reprimanded as signs of bad citizenship.[83] Voluntariness was exceptionally valued. Deliberate devotion to state service was not as fictitious as Lanni suggests[84] nor as impossible as a modern state's citizen would suppose. Contrastingly, the close identification of the citizen with the state, the imminence of real threats against the *oikoi* of a 'polis at war', and the obvious, appreciable impact that the voluntary participant could have (this impact being extended to himself, by reference to the community's opinion of him) were adequate incentives for voluntary self-sacrifice.[85] This extreme sacrifice of self-interest[86] revealed a *philopolis* personality that had internalised and adhered to the common norms to the extent of self-denial. By inference, such a person was an unlikely candidate for breaking the laws of the polis. Military service as a means of proof is thus adduced several times in the court speeches.

RESPECTING THE NORMS OF *PHILIA*

Philia designates a variety of positive bonds based on a sliding scale of affection and utility among social circles such as kin, friends, comrades and fellow citizens.[87] In the majority of such positive relationships, affection and concern dominate merely calculative considerations based on a strictly formal and objective structure of obligations.[88] The presence of a persuasive informal set of reciprocal norms emphasises and exemplifies the degree of affection between *philoi*. A citizen of an ancient Greek polis realised himself by reference to a nexus of such relationships carrying varying degrees of affection and divergent obligations. *Oikos*, friends, phratry, deme and polis all make (sometimes contradictory) ethical requests of their members. However, virtuous citizenship presupposed the sacrifice of one's self-interest (or his *oikos*' and friends') for the sake of his polis.[89] As the polis supersedes individual households and increasingly regulates the private sphere, private reciprocal obligations based on *philia* are limited (and transformed) to suit the interests of the wider community.[90]

The written laws of the polis coexisted with informal norms, both collections making ethical requests to the individual. The agent's degree of discipline and observance of these laws and norms is up to his character and personality. Betrayal or breach of the rules of *philia* exposes a character trait which is typical of the violator's more general conduct. The stronger the bonds between two people, the

more serious the injustice the perpetrator commits; and if he dares to injure his own *philoi*, nothing would stop him from acting analogously against his fellow citizens or his polis.[91] This ethical consideration was formalised by the Athenian legal system which provided for the penalty of *atimia* in cases of maltreatment of parents.[92] This offence included physical abuse as well as neglecting to perform certain obligations required by virtue of this relationship: *trophe*, *oikesis* and *taphe*.[93] Disrespecting the norms of *philia* made the perpetrator a probable lawbreaker.[94] Breach of the requirements of *philia* in the orators designated the character defects of disloyalty and ingratitude:[95] abandoning a father in need,[96] refusal to bury him,[97] defrauding brothers and kinsmen,[98] bringing false charges against kin or friends,[99] betraying friends or neighbours[100] are just some of the categories[101] that shocked the audience and exposed a litigant's wickedness and propensity to breach the norms of the polis.

Creating boundaries: ethical adherents and outsiders

Moral agents acting in accordance with the objective / participant model of the self, are engaged in 'primary' (*first-order*) reasoning to apply their deeply rooted ethical beliefs (i.e. the beliefs of their community) for determining the proper course of action in a particular situation. However, sometimes secondary (*second-order*) reasoning is employed denoting the reflection about the goals or rules which are operative in first-order reasoning. This may trigger questions as to the value, the validity or the desirability of specific conventional ethical beliefs. Second-order reasoning may give rise to less straightforward and problematic cases as to the application of the conventional ethical norms.[102] This is frequent in Greek tragedy which questions and disputes the validity of conventional ethical norms or weighs and contrasts norms in conflict. This second-order reasoning is absent from Athenian courts. There, conventional ethical norms are indisputable, forming a coherent universal set of action-guiding rules. Litigants competed to prove their wholehearted adherence to these norms by reference to their past acts which indicated a high degree of internalisation of indisputable communal beliefs.[103]

The existence of an unquestioned universal set of valid conventional social norms (which precluded notions like the 'moral autonomy' and 'self-legislation' of the individual) permitted an objective evaluation of a person's degree of loyalty to the ethics of the polis. It created ethical adherents and outsiders. In the Athenian courts' setting, this fact gains greater importance. In a society that professed the conformity of written laws with unwritten ethical norms, adherence to the latter signified obedience to the former. The substantive orientation of Athenian laws in particular, assisted the deeper internalisation of ethical norms by reference to the law's moralising effect.[104]

This can be further illustrated by reference to the frequently inaccurate attribution of Athenian laws to the (largely imagined) figure of Solon. The authority-figure of the 'ideal lawgiver' demonstrated the ethical coherence of Athenian laws and the legal system's almost mystical continuity through time. This imagined figure impersonated the ethical prototype of the Athenian legal system, persuading

the jurors to interpret the Athenian laws by reference to his demands.[105] When Athenian jurors decided a legal case, a specific law was applied and a wider ethical norm was reinforced.[106] The court acted as the moral educator of the polis which reinforced the single, universal, coherent set of primary ethical norms as 'action-guiding principles'. As a side-effect, the 'participant' ethical model of the self was thus sheltered and promoted.

The aforementioned considerations stress the importance for a litigant of presenting himself as a committed ethical adherent rather than the holder of an individualistic stance which could render him a moral outsider. In fact, a fierce contest as to who will prove himself closer to the communal values emerges as a pattern from the court speeches. In Antiphon 1 the speaker asserts that his stepmother poisoned his father, whose honour and justice he seeks to avenge. In doing this he has to face the wrath of his own kin who, instead of avenging the dead, side with the murderess. The dead man fell 'victim of those who should least of all have done this' (Antiph. 1.21) and this proves their ethical depravity. His kin have isolated him but he is not alone. He refers to the jurors and states:

> For you are my kin; those who should have avenged the dead and supported me are his murderers and my opponents (Antiph. 1.4).

This exact argument concludes Demosthenes' plea for justice in Demosthenes 28 after the alleged embezzlement of his property by his cousin Aphobus who had acted as his guardian. Aphobus betrayed the conventional ethical norms and the obligations of *philia* between kin. The twenty-year old Demosthenes states:

> Succour us, then, succour us, for the sake of justice, for your own sakes, for ours, and for my dead father's sake. Save us; have compassion on us since these, our relatives, have felt no compassion. It is to you that we have fled for protection (Dem. 28.20).

Litigants could also focus on the adversary's moral depravity as illustrated by his expulsion from his own social circles.[107] These circles, although closer to the opponent, should nonetheless be treated as representative of the polis' attitudes. Their reaction to the opponent's misconduct paved the way and posed the example of the proper treatment he should receive from the jurors. Especially illuminating is the treatment that Aristogeiton received from his fellow prisoners. They, refusing to withstand Aristogeiton's unacceptable (even for them) behaviour, 'passed a resolution not to share fire or light, food or drink with him, not to receive anything from him, not to give him anything' (Dem. 25.61). What should therefore be the proper response of the jurors to such a person who even in prison was an ethical outcast? The same rhetorical question was asked of jurors judging cases between Athenians and foreigners, the former presenting the latter as total outsiders.[108]

Nonetheless the prototype of the ethical outsider in the Athenian courts was the objectified persona of the sycophant.[109] Application of religious purification language and rites (used for *pharmakoi*) was appropriate to cleanse the city from

the unclean sycophants. These inverters of social norms manipulate and abuse the legal system, thus mutilating the cohesion of the polis.[110] In the case against Aristogeiton referred to above, in which Demosthenes presents his opponent as the typical sycophant-outsider[111] (being an outcast even in jail), he also provides the proper response to such ethical outcasts:

> His case is incurable, men of Athens, quite incurable. Just as physicians, when they detect a cancer or an ulcer or some other incurable growth, cauterize it or cut it away, so you ought all to unite in exterminating this monster. Cast him out of your city; destroy him (Dem. 25.95).

Ethical motivation prescribed by the social 'role'

Thus far it has been proved that according to the ancient model of the self, ethical motivation is illuminated by reference to the degree of the agent's whole-hearted adherence to the ethical norms of his community. One significant aspect of this, is ethical motivation and action according to what is required and expected due to the agent's social role and status.[112] Frequent use of such reasoning can be found in the Athenian courts. Following stereotypical beliefs as to how a 'virtuous citizen', a 'righteous youngster' or a 'respectable member of the elite' should behave, litigants stress and manipulate these expectations in order to support their legal cases.[113] Misfit between action and social role revealed the person's defective ethical motivation and a contemptible character trait that illuminated the particular case.

A 'good citizen' was expected to engage in certain forms of social conduct. In Demosthenes 18, the famous orator compares his civic behaviour with that of Aeschines. Every single quote is best understood by reference to the ethical motivation provided by their respective roles as 'citizens'; yet, the one was virtuous, the other contemptible, in accordance with Athenian society's expectations:

> You were an usher, I a pupil; you were an acolyte, I a candidate; you were clerk-at-the-table, I addressed the House; you were a player, I a spectator; you were cat-called, I hissed; you have ever served our enemies, I have served my country (Dem. 18.265).[114]

Exercising a menial calling could also be interpreted as unfitting and degrading for a citizen.[115] Stereotypical beliefs as to the virtue of farmers as opposed to merchants and hand-workers are repeatedly found in ancient literature. Unsurprisingly then, they are followed in the court speeches (albeit sometimes manipulated), allegedly placing undue emphasis on the 'person' rather than the 'deed' of the legal charge.[116] However, even in such circumstances, these allegations illuminated an aspect of the opponent's character which could be invoked in connection with the offence.[117] In Demosthenes 57, the exercise of a menial calling was adduced in order to prove that the defendant was not an Athenian citizen. Selling ribbons in the agora or (for his mother) serving as a nurse did not coincide with Athenian citizenship.[118]

Bravery and self-sacrifice were also prescribed by the role of a 'virtuous citizen'.[119] The same degree of adherence to Athenian ethical norms was demanded from the metics as well. The 'role' of a peaceful metic prescribed the return of gratitude for his residence in Athens and generosity to the polis that nurtured him.[120] Failure to act accordingly and conform to social expectations could expose wrong ethical motivation and be used as a means of proof of a legal case. The same degree of gratitude towards the Athenians was expected in cases of naturalisation. Apollodorus, acting in accordance with this 'role', in revealing his gratitude and his resulting ethical motivation states:

> When it came to fixing the penalty, the jurymen wished to impose a sentence of death upon him, but I begged them to do nothing like that on a prosecution brought by me, and I agreed to the fine of a talent which these men themselves proposed—not that I wished to save Arethusius from the death penalty (for he deserved death on account of the wrongs which he had committed against me), but that I, Pasion's son, made a citizen by a decree of the people, might not be said to have caused the death of any Athenian (Dem. 53.18).

Analogously, behavioural scripts were prescribed for other classes of persons as well, such as youngsters. Again, the presence of stereotypical presumptions about youngsters' characters and conduct are decisive and set the norm.[121] Such agents needed to excuse themselves for bringing lawsuits in order to avoid any prejudice for litigiousness and meddlesomeness.[122] The typical youngster had not fully internalised the ethical norms of his community and behaved in accordance with his impulses and desires. The characteristic prejudice against youth's lack of self-control,[123] hubris and aggressiveness[124] could decisively turn the balance against a young litigant. In Lysias 16, the young, long-haired aristocrat Mantitheus needs to explain the ethical motivation behind his conduct, which was untypical for his role.[125] On other occasions, young adversaries are accused of not putting their natural characteristics in the service of the state. Their role prescribed bravery and vehemence in war rather than cowardice.[126] Their role also prescribed shyness and decency.[127] On the other hand, similar expectations were existent for mature and respectable citizens. Failing to act in accordance with the role of the *sophron* man was contemptuous and blameworthy.[128] It revealed a defective ethical motivation which could be then invoked in order to illuminate a particular legal case.

The invocation of liturgies as the culmination of the 'objective / participant' model

The invocation of liturgies in Athenian courts has been the core of controversy in modern scholarship since it is perceived as providing the most characteristic type of irrelevant argumentation. On the one hand, scholars who view Athenian courts as having the role of acceptable, non-violent arenas for extending feuds follow a structural interpretation of this practice and assert that by adducing their liturgies, litigants entered into a contest for honour and prestige. Furthermore, structural,

class tensions within the democratic system, such as those between the elite and the demos, were regulated and fashioned either by the popular jury's control of Athenian liturgists through the court system (and the final accommodation between rich and poor) or by the elitist implicit threats of withdrawal presented through the litigants' orations.[129] Based on similar methodology, an alternative interpretation is offered by Millett, who sees the liturgies as 'disruptive of elite cohesion' and as 'a weapon that the rich turned against each other as well as against the egalitarianism of democracy'.[130] Although such interpretations may be valid (as supplementary to the main role of the courts as enforcers of the law) they are not free from controversy.

The main idea that such invocations were centred on ideas of reciprocity is vulnerable on the following grounds. This notion is better understood in the form of 'generalised reciprocity' involving a 'gratuitous gesture' on the part of the obligated, revealing his noble and unforced generosity, rather than a restricted ('quid-pro-quo' type) repayment of services.[131] Hence, the Greek norms of reciprocity precluded the acceptability of a litigant seeking a particular method of return for his public expenditure. Furthermore, an (even implicit) assertion that a specific breach of the law could be annulled and redeemed by reference to public services would automatically place the polis (the demos, i.e. the jurors) and its legal system (which the Athenians highly valued) in a position of inferiority against the assets of a wealthy litigant.[132] Explicit statements of such a type are totally absent from Athenian courts; to impose them on the implicit reasoning of the litigants or the unknown deliberation of the jurors would be inappropriate. Finally, seeing the institution of law (and consequently the courts) as fundamentally designed to break such cycles of reciprocity, I consider it unlikely that Athenian jurors succumbed to such reasoning in defiance of legal justice and their oath.[133] On the contrary, I would assert that even implicit argumentation of this type on the part of the litigants would run the great risk of backfiring by alienating the jury, if the latter considered it as irrelevant and obstructive of legal justice.

Even when scholars concentrate on legalistic issues, controversy persists. In this field the main controversy concerns the degree to which the invocation of liturgies by Athenian litigants influenced the verdicts of jurors. To offer but a couple of indicative examples, Christ concentrates on the incentives given by a wealthy litigant to jurors to show gratitude (*charis*) and vote for him by reference to the future material benefit his acquittal will bring to the polis.[134] However, Harris convincingly demonstrates by reference to the few known court decisions that such argumentation did not have the force to make the jurors betray their oath and vote contrary to the law.[135] Harris then goes as far as asserting that the invocation of liturgies aimed at distracting the jurors, though it was relevant at the *timesis* phase (regarding the assessment of the penalty).[136] However, such a conclusion is not supported by evidence[137] and does not fit with the steady presence of such argumentation in *agones atimetoi*. As a matter of fact, since the decisions of Athenian trials rarely survive, any effort to uncover the implicit reasoning of the jurors is based on circumstantial evidence and is largely speculative. What is needed is a more objective method of interpreting the invocation of liturgies. The application

of the 'objective' / 'participant' model is a suitable and valid starting point for an interpretation of forensic speeches by reference to the way the Athenians received them.

In the first part of this chapter it has been shown how the invocation of liturgies may serve to illustrate the character of litigants, by reference to their typical 'practical reasoning'. Frequent, lavish and voluntary liturgies that exceed the requirements of the law reveal by induction the character of a law-abiding, magnanimous[138] public benefactor, thus rendering him an unlikely candidate to perform a crime.[139] Such argumentation is not rejected by the prosecutors as irrelevant. On the contrary, acknowledging its value, they attempt to diminish the effect of their opponent's public expenditure stating either that this took place out of selfish opportunistic calculation (thus it does not reveal the genuine character of a magnanimous, pro-democratic *philopolis*) or that the type of liturgies performed by the opponent was useless to the polis as a whole.[140] Therefore, this type of reasoning ('rule-case') could lead the jurors to assert whether such a person was capable of performing an illegal deed,[141] assist the litigant to win their goodwill and increase the credibility of his character. Adding to this the shame-culture's emphasis on the 'person' rather than the 'act' it may be suggested that the invocation of liturgies complies with this model of interpretation and becomes relevant in solving a particular legal case.

The second type of reasoning that has been discussed ('means-end' type) may assist in interpreting more problematic cases. The most characteristic and notorious passage is found in Lys. 25.13 which, though usually curtailed and taken out of context, reads:

> But my purpose in spending more than was enjoined upon me by the city was to raise myself the higher in your opinion, so that if any misfortune should chance to befall me I might defend myself on better terms.

Reading merely this statement may leave the impression that a person's liturgies enter into the courtroom as external and irrelevant aid in order to distract the jurors from the facts of the case. However, this case involves a charge of 'subverting the democracy'. The speaker continues:

> Of all this credit I was deprived under the oligarchy; for instead of regarding those who had bestowed some benefit on the people as worthy recipients of their favours, they placed in positions of honour the men who had done you most harm, as though this were a pledge by which they held us bound. You ought all to reflect on those facts and refuse to believe the statements of these men: you should rather judge each person by the record of his actions.

Even if taken at face value, the statement is clearly relevant to the legal charge, relating to his characteristic attitude towards the demos. However, we may stretch the analysis further.[142] The speaker is accused of oligarchic affiliations. The period

is uneasy since shortly after the fall of the Thirty and the restoration of the democracy such cases were frequent. By reference to 'external rule-type' reasoning, wealthy members of the elite (especially those who stayed in Athens during the reign of the Thirty) were the usual suspects, but also vulnerable targets, of sycophants (25.1, 3). The speaker is clear as to his aims from the beginning of his speech, in trying to differentiate himself from the rule-case:

> And I claim, gentlemen, if I am found to have been the cause of none of our disasters, but rather to have performed many services to the State with both my person and my purse, that at any rate I should have that support from you which is the just desert (25.4, cf. 11−12).

The speaker continuously revokes the prejudicial 'rule-case' reasoning which renders him suspect for being disloyal to the democracy:

> But in fact they conceive that your resentment against those men [the Thirty] is sufficient to involve in their ruin those who have done no harm at all. [6] I, however, hold that, just as it would be unfair, when some men have been the source of many benefits to the city, to let others carry off the reward of your honours or your thanks, so it is unreasonable, when some have continually done you harm, that their acts should bring reproach and slander upon those who have done no wrong (25.5−6).

Switching to a 'means-end' type of reasoning, he annuls any ulterior 'end' that could be imposed on him by his enemies for his extravagant spending and his great resources.[143] In this model, the 'means' is his lavish expenditure, while the 'end' imposed could be the showing off of his power which could – stereotypically − render him suspect. On the contrary, he advertises a different 'end' for his lavish expenditure. This 'end' is pro-democratic (in opposition to the charge with which he is accused), humble and respectful to the power of the demos. The allegation is simple: I performed lavish liturgies for the sake of my polis and the democracy because I am a loyal citizen. Knowing that many sycophants[144] lurk, I considered this 'means' (performing liturgies) as the best available for proving my character and my loyalty to the constitution, and for achieving the 'end' of gaining your goodwill (out of my respect for and submission to the democratic law court) for the sake of justice.

Such argumentation may also be interpreted by reference to the 'participant' model of the self as indicating the agent's ethical motivation. Voluntary lavish expenditure for the benefit of the community shows in practice a whole-hearted adherence to the norms of the community. Supporting by one's possessions the democratic institutions, as well as lavishly financing the military of the polis, proves the internalisation and adoption of this community's practices. In addition, according to the agent's adherence to his role in the community, the performance of public services could be interpreted as 'this is how a virtuous member of the elite should act'.[145]

The agent's role in the community may be adduced to illuminate cases of naturalised citizens as well:

> Whatever concerns the state, however, and all that concerns you, I perform, as you know, as lavishly as I can; for I am well aware that for you who are citizens by birth it is sufficient to perform public services as the laws require; we on the contrary who are created citizens ought to show that we perform them as a grateful payment of a debt (Dem. 45.78, cf. 85).

A citizen's role dictated the subordination of his *oikos*' obligations to those of the polis:

> [. . .] never once when I had to perform a public service in your aid did I consider it a hardship that I should leave my children so much the poorer, but much rather that I should fail in the zealous discharge of my obligations (Lys. 21.23).

The frequent invocation of liturgies is best understood and becomes relevant when viewed as the culmination of the ancient model of the 'objective / participant' self. Such argumentation needs to be interpreted in the light of the beliefs of the Athenians, not by reference to modern presuppositions and subjective perceptions.

Notes

1 The range of (everyday or more technical) meanings of 'personality' and 'self' simply reveal an aspect of the problem. Cf. Gill (1996), pp. 1−2.
2 Gill (1996).
3 See for example Williams (1993); Wilkes (1988); for a detailed discussion and bibliography see Gill (1996), Ch. 1.1−2.
4 For the definition of 'subjective' and 'objective' in this context see Gill (1996), pp. 6−7.
5 Cf. Gill (1996), p. 12.
6 Prominent developmental accounts are those of Snell (1953) and Adkins (1970). For criticism of these accounts see Gill (1996), Ch. 1.1.
7 Davidson (1980).
8 Gill (1996), p. 52.
9 Gill (1996), p. 53; for further discussion of this passage and other cases of Homeric deliberation see Ch. 1.3–4.
10 Gill (1996), p. 55.
11 The background of the case and the enmity of the defendant towards the victim made reconciliation unattainable. Furthermore, the defendant was quite certain that he would be convicted and suffer a heavy penalty; see Ant. 2.1.8.
12 On serving the polis with 'person and property' as the essence of good citizenship, see Christ (2006). On liturgies as testimonies of good character see Rubinstein (2000), pp. 213ff. On the extension of liturgies so as to embrace any kind of virtuous public conduct Lewis (1960), Saunders (1991), p. 114; cf. Millett (1998), pp. 241−2.
13 This model of interpretation puts the (usual) discussions of the background to the dispute and its context within the logical argumentation referring to the *specific act* that gave rise to the legal dispute. In order to prove the commission of this act by the opponent, a plausible motive should be offered, and this was usually discovered in the

history of the adversaries' relations. This model of interpretation rejects Lanni's assertions as to the irrelevance of such argumentation and its interpretation as providing more general reasons to the jurors to reach a verdict based on general notions of justice and equity rather than strict reasoning about the particular case. See Lanni (2006).

14 My interpretation therefore is diametrically opposed to Cohen (1995) and Ober (1989), in highlighting the role of the courts (and of litigants' speeches) as 'objective discoverers of truth', with character evidence significantly facilitating this quest.

15 On the problems surrounding this particular offence and the speech in general see Todd (2008).

16 Although sometimes this 'end' is coupled with secondary reasons such as 'revenge'.

17 This passage, if interpreted in light of this model, illuminates the inner reasoning behind the challenges (dares) in Athenian courts. Slaves' tortures and oath-challenges provide the 'means' to attain the 'ends' of learning the truth and achieving justice. Facilitation of this 'means' signifies adherence to the 'end' of truth, while their rejection reveals ulterior motives. For the use of 'dares', see Johnstone (1999). Their extensive presence in Athenian courts highlights the dominance of disputes about 'facts' rather than 'law'.

18 Lyc. 1.55: 'The first point is that men travelling as merchants do not leave by the postern on the beach; they embark inside the harbour with all their friends watching to see them off. Secondly, they go alone with their attendant slave, not with their mistress and her maids. Besides, what need had this Athenian to stay five years in Megara as a merchant?'

19 The invocation of harsher, though irrelevant, laws serves to highlight the mild 'means' via which the prosecutor chases his 'ends'. As a character trait, it may be interpreted as modesty and reasonableness, standing in opposition to the defendants' illegality and hubris.

20 For discussion of this case see Ch. 4.

21 *Pace* Christ (1998), pp. 41 and 196.

22 On the role of the 'plaint' see Harris (2013b). Harris convincingly asserts that the written plaint served as the 'point' which litigants' argumentation should refer to and on which jurors' decision should focus. Therefore, the requirement of 'speaking to the point' is best illustrated by reference to the written plaint.

23 My interpretation of references to 'harsh impacts' opposes that of Lanni (2006), especially in the sense that Lanni interprets them as widening the legal case by introducing statements which could influence the jurors' decision by references to wider norms (such as equity). My interpretation supports the view that such references further illuminate the legal case, support argumentation about the innocence or guilt of a litigant and induce the jurors to decide in accordance with the law and their oath, by providing yet another reason for their reasoning.

24 For the statistics on these approaches and further analysis see Johnstone (1999), pp. 109–20; on supplication in Athenian courts see Naiden (2004); 'pity' as an emotion will be further discussed in Chapter 6.

25 See for example Lys. 3.47; Lys. 4.20; Lys. 7.41; Lys 9.21; Lys. 19.33; Lys. 20.35; Lys. 21.25; cf. Andoc. 1.146–9. Cf. Macdowell (1962), p. 163 where he observes that: 'for the family to become extinct would be a misfortune not only to Athens, but also in the usual Greek view, to the dead members of the family itself.'

26 See esp. Lys. 24.6–9; Dem. 55.35. Likewise, arguments from reciprocity and requests for *charis* complete the aforementioned pattern.

27 For 'pity' as a response to unmerited suffering highlighting the innocence of a defendant, see Konstan (2000). This is not a case of 'jury nullification' since the defendant does not ask for 'pardon' (which implies an admission of 'guilt'). Further discussion in Chapter 6.

28 Griffith (1997). See for example the political rationale behind the US Supreme Court's judgment in *Brown v Board of Education of Topeka* 347 U.S. 483 (1954) which

overruled the verdict of the same court in *Plessy v Ferguson* 163 U.S. 537 (1896). It is particularly interesting how Chief Justice Warren, largely based on political considerations, managed to build consensus among the Justices, with the Supreme Court finally delivering a unanimous decision.

29 The insecurity that the Athenians felt as regards the democratic constitution began with the reforms of Kleisthenes and the establishment of democracy in 508/7 and reached its climax after the two short periods of oligarchic coups in 411/10 and 404/3. However, the anti-tyrannical sentiment and the insecurity about the democratic constitution were especially recurrent in times of crises. This is best reflected by the passing of relevant anti-tyranny legislation, e.g. the alleged original purpose of ostracism, the decree of Demophantus (410 BC), and the law of Eukrates (337/6 BC).

30 The fact that 'public impact argumentation' supplemented, rather than replaced, the legal argument is proven by Harris (2007) in his discussion of liturgies. Although I do not agree with his assertion that liturgies were invoked in order to influence jurors in the *timesis* phase (otherwise they could be seen as irrelevant aberrations), his analysis of verdicts as uninfluenced by 'public impact argumentation' when this stood in opposition to legality is convincing; see for e.g. Hyp. (*Euxenippus*) at 34.

31 See for e.g. Lys. 19.61; cf. 20.36; 21.13−5; 19, 25.

32 Andoc. 1.145; Lys. 6.48. This kind of consideration is reinforced by reference to a flip-side argument found in Lys. 14.44: 'what is more, even if he left the city he could do you no harm, craven and pauper that he is, with no ability for business, at feud with his own folk and hated by everyone else; so neither is there any reason here to be heedful of him.'

33 Aeschin. 2.180; Aeschin. 1.186; 1.194; Lys. Lys. 1.47; Lys. 5.5; 14.45; Lys. Fr.7 [134].

34 On the statistics of the Heliastic oath in forensic speeches, see Johnstone (1999), pp. 33−45; my view regarding the role and effect of the *dikastic* oath in Athenian courts coincides with that of Harris (2006a), *contra* Christ (1998), pp. 194−6.

35 E.g. the Heliastic oath, the written plaint, the *echinoi*, social sanctions etc.

36 Cf. Aristotle, *Rhet*. 1358b32−3: 'For example, a man on trial does not always deny that an act has been committed or damage inflicted by him, but he will never admit that the act is unjust; for otherwise a trial would be unnecessary.'

37 See for e.g. Aes. 1.187: 'What then, pray, are you going to answer, you in whose hands the decision now rests, when your sons ask you whether you voted for conviction or acquittal? When you acknowledge that you set Timarchus free, will you not at the same time be overturning our whole system of training the youth?'

38 Emotional appeals (e.g. pity, anger, envy etc.) as consistent with legal argumentation, and 'emotions' as consistent with 'reason' will be discussed in Chapter 6.

39 Gill (1996), p. 7.

40 See Gill (1996), p. 9, with n. 27.

41 See Gill (1996), p. 11 regarding the 'subjective-individualist conception' of the self.

42 Gill (1996), p. 7.

43 MacIntyre (1985), p. 128.

44 Gill (1996), p. 86, cf. pp. 175−6.

45 Although there is no need to distinguish between 'shame-cultures' and 'guilt-cultures', classical Athens will be referred to as a 'shame-culture' for the sake of convenience.

46 See Williams (1993); Cairns (1993); Konstan (2003).

47 Cf. Plat. *Prot.* 325c−326e.

48 Gill (1995), p. 25 describes this process as follows: 'Shame, both in Greek and modern culture, does not depend simply on the force of the social judgments made by other people on one's actions. It also depends on the individual's *internalisation* of the ethical judgments made in one's society, so that these become 'one's own', as well as part of the discourse of the society.'

49 Williams (1993), Ch. 4.

50 'Shame' as an emotion will be discussed in Chapter 6.

51 Cairns (1993), p. 44.
52 Cairns (1993), p. 45: '[although] there is a certain amount of evidence which suggests that Greek culture actually did place greater emphasis on the excellences of persons and on ideal self-image than we do, the difference is again one of degree, for focus on agents rather than acts can only be a matter of emphasis; any focus on oneself as a certain type of person must take into account the character of one's acts, and any rejection or repudiation of a specific act must encompass a conception of one's selfhood.'
53 Evidenced for example by the emphasis the ancient Athenians placed on the demotic name for the identification of a certain individual.
54 See for e.g. for *aidos* Cairns (1993); for *sophrosyne* Rademaker (2005); for manhood Roisman (2005); for litigiousness and bad citizenship Christ (1998) and (2006) respectively; for hubris Fisher (1992), Cairns (1996); MacDowell (1976).
55 See for e.g. Fisher (1976), p. 41; Seaford (1994), p. 611 with nn. 150 and 151; Rademaker (2005).
56 Self-restraint could be expressed as control of sexual desires, as moderation in the face of conflict or excessive litigation, as the denial of unjust enrichment or bribery etc. Acts of this kind reveal a more general character trait which makes the person incapable of *paranomia* (both in the form of breaking the law and of breaking the ethical norms).
57 Rademaker (2005), p. 233.
58 Meidias' record of past acts is full of attempts at bribery, insolence, violence and hubris, proving him a social and ethical outsider. His wealth and power make him arrogant, voluntarily transgressing and showing contempt for the laws. See for example Dem. 21.17, 21.66−70, 21.79, 21.85ff., 21.109−12, 21.123−4 et.al.
59 Nonetheless, public service and invocation of liturgies are not rejected as irrelevant. They have probative value as means of proving a person's character and ethical motivation.
60 For the jurors' inducement to anger and punishment of the defendants in order to make them examples for future possible transgressors in different contexts (e.g. in a *graphe* or in a *dike*) see Rubinstein (2004), (2005a).
61 The respective characters of the opponents provide the ground which links the speaker's argumentation. The *philopolis*, law-abiding, reasonable and *sofron* citizen (53.33−5, 38, 44, 68−70) stands against the violent, disrespectful, greedy and illegal adversary (53.28, 31, 52−60). The first is motivated by the correct ethical norms while the second reveals his characteristic contempt for them at every single opportunity.
62 Cf. Aeschin. 1.55.
63 E.g. Aeschin. 1.117; 2.180. Demosthenes replies by reference to Aeschines' hubristic attitude against an Olynthian woman (19.196−9).
64 See for example Aeschin. 1.131, 163−4, 167, 170ff., 181; 2.23, 88, 127, 148, 151, 179; 3.155, 162, 167, 172−4.
65 Aeschin. 3.77−8.
66 Andoc. 1.124−31.
67 See for example Lys. 4.4−9; 13.66; 14.25−7; 24.15.
68 This characteristic disrespect for the laws of the polis and contempt for fellow citizens becomes a pattern to be followed in other trials for unconstitutional or illegal measures. Cf. Dem. 24.76−7, 124.
69 Cf. Dem. 24.197, where the defendants do not deserve the jurors' characteristic compassion shown to people in misfortune, since they failed to do the same when in power.
70 See for example Dem. 24.3: 'while Timocrates has their fee in his pocket, and never introduced his law until he got it, I, so far from getting any reward from you, am risking a thousand drachmas in your defence.' Cf. Dem. 24.14. Corruption (especially of officials) – the psychosis of the Athenians − had become the stereotypical argument of most Athenian litigants; see for e.g. Lys. 26.23−4; 27.2−3; 27.9−10; 30.25; Antiph. 6.34 et.al. This was a central argument in the fierce judicial contest between Demosthenes

and Aeschines; see for example Aeschin. 2.154, 165−6; 3.69, 85−6, 91, 94, 104−5, 113, 125, 129, 149, 156, 167, 209, 214, 218, 220, 222, 237, 239, 240, 259; cf. Din. 1.44; Hyp. 5.20; For Demosthenes' accusations against Aeschines for corruption see for example Dem. 18.44, 49, 52, 131, 284, 286, 297; 19.145−6, 230, 265, 275, 314.

71 In opposition to 'non-adherence to the ethos of the polis', ethical concord could be adduced in order to prove the justice of one's case; see for example Dem. 36.58: 'Phormio, then, men of Athens, who has in so many ways proved himself of service to the state and to many of you, and has never done harm to anyone either in public or in private, and who is guilty of no wrong toward this man Apollodorus, begs and implores and claims your protection . . . '

72 Cf. Dem. 57.59.

73 The speeches of Lysias are more indicative of patterns of argumentation regarding loyalty to the democracy since they were written and delivered in troubled times. Many cases were triggered by alleged cooperation with the Thirty and this was a common background for one's argumentation as to political affiliations. See for e.g. Lys. 12 and Lys. 13. Cf. Lys. 9.17; 10.31; 20.17; 30.7−8; Fr. 3.a.2; Fr. 7.

74 See for example Dem. 42.2, 8−10, 15, 30; 43.6; 50.45; 58.14; Lys. 30.4−5.

75 See for example Lys. 5.3; 25.16; 26.21−2; Antiph. 6.9; 4.19.

76 See for example Aeschin. 1.1, 116, 159; 2.181−2; Lys. 16.10; Lys. 19.55; 22.1−4; 26.15; Dem. 18.222−6. Cf. Christ (1998), pp. 148ff.

77 E.g. Andoc. 1.56, 68, 101, 102, 134; Dem. 18.86, 88, 94, 108−11, 125, 173, 179−80, 197, 206, 277, 288, 298, 306; 19.166, 170−3, 230; Antiph. 6.38, 50. On the other hand, enemies of the polis were also easily identified by reference to their treacherous past acts. These revealed a character trait that directed such conduct and were attributed to a character defect; see for example Lys. 12.2, 36, 42, 82, 94; 13.2, 30, 59, 65; 22.14.

78 Aeschin. 1.141; cf. Lys. 14.9.

79 Aeschin. 2.23; contrast this with the conduct of the Thirty in perverting the burial rituals in Lys. 12.18 or Demosthenes' alleged conduct in Aeschin. 3.77−8.

80 See for example Lys. 24.3: 'So now, gentlemen, it is clear that he envies me because, although I have to bear this sore misfortune, I am a better citizen than he is.'

81 Lys. 1.5, 26, 1.29, 1.47, 1.50; in 1.26 Euphiletus (the defendant arguing for a lawful homicide) states: 'It is not I who am going to kill you, but our city's law, which you have transgressed and regarded as of less account than your pleasures, choosing rather to commit this foul offence against my wife and my children than to obey the laws like a decent person.'

82 See for example Dem. 54.44 (members of an *oikos* serving both in person and their property); cf. Lys. 20.14, 23 as indicative of loyalty and affection to the polis; cf. Lys. 7.30−1; 16.13−8; 21.6−11, 24. Such considerations are adduced as possible grounds for acquittal in Lys.6.46−9; cf. Aeschin. 2.167ff. (continuous military record since his youth) in reply to Dem. 19.113.

83 See Christ (2006), Ch. 2 and 3. For references to cowardice or military evasion in the orators see for example Aeschin. 2.79, 148; 3.151, 155, 159−60, 163, 167, 175−6, 181, 214, 253 (references to Demosthenes' conduct in deserting his post at the battle of Chaeronea); cf. Dem. 21.110, 133, 166−7 (Meidias deserting his post and discovering questionable methods to avoid risking his life with his fellow citizens) cf. Lys. 14.9, 17, 44; 21.20; 10.25ff. These arguments are usually adduced on grounds of 'fairness', i.e. in anticipation of or reply to similar accusations from the opponent.

84 Lanni, (2009), p. 30 states that 'the Athenian approach of enforcing extra-legal norms through the courts created state sanctions for violations of public service norms, while at the same time permitting the Athenians to maintain the fiction that Athenians fought for and served the state out of patriotism.' Even though I am opposed to Lanni's more general argument (regarding the enforcement of extra-legal norms) in the sense that Athenian courts predominantly enforced the written laws and (as a side-effect) the

moral norms hidden behind the particular statutes, this study proves the more specific argument about the fictitiousness of voluntary service equally wrong. Lanni bases her supposition on entirely anachronistic grounds. In particular, she asserts that the Athenian state purposefully enforced such extra-legal norms since they offered the advantage of bolstering 'the democratic ideal of a limited state' (p. 24). Furthermore, she asserts that the Athenians were able to 'maintain the fictions of an unregulated private sphere' (p. 28). I consider these suppositions entirely alien to the context of an ancient polis and the Athenian state in particular. I prefer to side with Finley's perception of the polis as a potentially 'all-encompassing' community [cf. Fisher (1976), p. 1] which could regulate any kind of private or public behaviour [for the regulation of the private sphere, and the tensions created by the conflicting interests of the polis and the *oikos*, see Seaford (1994)]. I also disagree with Lanni's assertion that the polis was militarily supported by coercion rather than patriotism and voluntarism. This is yet another anachronistic assumption of a modern state's citizen. I prefer to see the polis as a 'nation at (constant) war' [cf. Adkins (1960), pp. 28−32); Dover (1974), pp. 159−60 with n. 32] whose citizens had internalised the Homeric agonistic values of *arête*, and where draft-evasion was the exception to the norm (and a sign of 'bad citizenship'). After all, if Athenians were coerced to go to war, who voted for it in the Pnyx?

85 Cf. Fisher (1976).

86 For 'self-interest' as the utmost sign of 'bad citizenship' see Christ (2006), p. 9. By conceptualisation (and with reference to our discussion of the brutality of human 'nature'), human beings showing excessive self-interest reveal their uncultivated character, which renders them unsuitable for living in a polis. By inference, such characters could break any communal law or norm to achieve their selfish goals.

87 Mitchell (2002) Ch. 1; cf. Konstan (1996).

88 Konstan (1996), p. 86.

89 However, obligations based on *philia* were deemed so powerful that they could be offered as excuses (or as more valid reasons than e.g. bribery) for law-breaking in courts; see Dem. 20.195−6.

90 See Seaford (1994), Chs. 4, 6.

91 Cf. Arist. *Nic. Eth*. 1160a: 'Injustice therefore also is differently constituted in each of these relationships: wrong is increasingly serious in proportion as it is done to a nearer friend. For example, it is more shocking to defraud a comrade of money than a fellow-citizen; or to refuse aid to a brother than to do so to a stranger; or to strike one's father than to strike anybody else. Similarly, it is natural that the claims of justice also should increase with the nearness of the friendship, since friendship and justice exist between the same persons and are co-extensive in range.'

92 Andoc. 1.74; Xen. *Mem*. 2.2.13; Dem. 24.60; Aeschin. 1.28.

93 Aeschin. 1.13; cf. Hansen (2006), p. 56.

94 Lys. 30.23: 'for if a man commits such crimes against his own relatives, what would he do to strangers?'

95 On the other hand, observance of these obligations revealed affection, loyalty and observance of the ethical norms of the community. See for e.g. Lys. 7.41; 24.6; Andoc. 1.118−9. Supporting speakers usually invoked their personal intimacy with the litigant they assisted; see for e.g. Dem. 20.1; 58.3.

96 Dem. 24.200; or a close relative Aeschin. 1.103.

97 Dem. 25.54; Aeschin. 1.99; Lys. 31.30.

98 Dem. 24.127; 36.36; (sister) 24.202; 25.55; (guardians embezzling property of orphans) Dem. 27.65; 28.15−6.

99 Dem. 45.53, 56, 70; Aeschin. 2.93; 3.51, 172.

100 Dem. 25.57; 53.4; Andoc. 1.54, 56, 68 in reply to Lys. 6.3, 7, 23−4; 14.26−7, 44; 15.10; 32.10; Fr. 8.

101 For a more detailed treatment of the issue see Christ (1998), pp. 167ff.

102 See Gill (1996), pp. 117, 133, 181, 237, 239.

103 Burkert (2013), p. 76: 'To belong to a group is to conform to its standard of purity; the reprobate, the outsider, and the rebel are unclean.'
104 On the substantive orientation of Athenian laws see Harris (2009); cf. Farenga (2006), pp. 276–9.
105 On the figure of the 'ideal lawgiver' and its implications see Johnstone (2009), pp. 25–33; cf. Harris (2006b). I borrowed the notion of the authority figure as assisting the internalisation of norms from Cairns (1993), p. 39 since I find its application to the Athenian legal system's context with its frequent invocation of the 'ideal lawgiver' suitable.
106 This I consider to be the essence of the 'legal enforcement of morals in classical Athens', namely the reinforcement of the wider ethical norm that triggered the enactment of a particular law. In this way the court, apart from its primary task of implementing the rule of law by applying specific laws to particular legal cases, acted also as the moral educator of the polis in the absence of an official system of education. Cf. Rubinstein (2005a, 2005b).
107 See for example Dem. 21.197: 'That is my own opinion of him [that he is an unhallowed ruffian]; [for how else are we to describe a creature whom his own troopers, his brother-officers and his friends cannot stomach?'
108 See for example Hyp. *Athen*. 3: the opponent 'is a speechwriter, a man of affairs and, most significant of all, an Egyptian'; cf. Dem. 35.1–2.
109 For a similar discussion about the underlying connotations of being a sycophant see Christ (1998), pp. 50ff.
110 Christ (1998), p. 54 refers to the second sycophant scene of the *Acharnians* (esp. l. 944–5) as symbolic of the sycophant's conduct: 'the sycophant's restless and disruptive energy is literally contained and this inverter of norms is himself appropriately turned upside down'; cf. the figure of Cleon – Paphlagon in the *Knights*.
111 Cf. Christ (1998), pp. 57–9.
112 Gill (1996), Ch. 1.3 discusses Odysseus' monologue in Hom. *Il*. 11.401–10 where his ethical motivation is dictated by his social role and he accordingly decides to act as a 'good Homeric chieftain' would do.
113 The requirement that a person should act in accordance with the 'social role' confirms (from the perspective of 'ethical motivation') the 'rule-case' type of inferential practical reasoning. Ancient ethical motivation and human action coincide and complement each other.
114 Cf. Dem. 19.299–300.
115 Such stereotypical beliefs relating to one's appearance or calling survive in different forms even in our days and are sometimes adduced in the courts [Munday (2005), p. 38]. In the small-scale society of the ancient polis, their force would unavoidably be greater. Cf. Arist. *Rhet*. 1367a: 'Customs that are peculiar to individual peoples and all the tokens of what is esteemed among them are noble; for instance, in Lacedaemon it is noble to wear one's hair long, for it is the mark of a gentleman, the performance of any servile task being difficult for one whose hair is long. [27] And not carrying on any vulgar profession is noble, for a gentleman does not live in dependence on others.'
116 See for example Dem. 37.52: 'When anyone asks him, "What valid charges will you be able to make against Nicobulus?" he says, "The Athenians hate money-lenders".'
117 See for example Arist. *Nic. Eth*. 1121b who refers to different callings as revealing character traits: 'The other sort of people are those who exceed in respect of getting, taking from every source and all they can; such are those who follow degrading trades, brothel-keepers and all people of that sort, and petty usurers who lend money in small sums at a high rate of interest; all these take from wrong sources, and more than their due.' For invocations of the opponent's menial calling see for example Dem. 18.127, 129, 209, 261–2, 267; 19.70, 95, 120, 200, 247, 314; 37.52; 57.31, 35; Lys. 30.27–8.
118 Dem. 57.31, 35; 57.31: 'We on our part acknowledge that we sell ribbons and do not live in the manner we could wish, and if in your eyes, Eubulides, this is a sign that we are not Athenians, 57.35: He has said this too about my mother, that she served

as a nurse. We, on our part, do not deny that this was the case in the time of the city's misfortune, when all people were badly off; but in what manner and for what reasons she became a nurse I will tell you plainly. And let no one of you, men of Athens, be prejudiced against us because of this; for you will find today many Athenian women who are serving as nurses'.

119 See for example Lys. 30.5; 31.7: 'My opponent has placed a higher value on his personal safety than on the public danger' cf. Lyc. 1.

120 See for example Lys. 12.20; Fr. 7; on the other hand, a metic's hostile behaviour revealed a more general enmity against the polis; see Lys.24.14.

121 Arist. *Rhet*. 1369a: 'For if the young happen to be irascible, or passionately desire anything, it is not because of their youth that they act accordingly, but because of anger and desire. Cf. 1389a: The young, as to character, are ready to desire and to carry out what they desire.'

122 For this *topos* see for example Antiph. 1.1, 30; 5.1, 79; Dem. 27.2; 29.1; 44.1; 53.13; 54.1; 58.3.

123 E.g. Antiph. 3.3.6.

124 E.g. Antiph. 4.1.6; 4.3.2; 4.4.2; 4.4.6; Lys. 24.15−6; Dem. 54.14.

125 Lys. 16.20: 'I have had occasion to observe, gentlemen, that some people are annoyed with me merely for attempting at too early an age to speak before the assembly. But, in the first place, I was compelled to speak in public to protect my own interests; and indeed, in the second, I do feel that my tendency has been unduly enterprising: for in reflecting on my ancestors, and how they have continually taken part in the administration, I had you also in my view . . .'

126 In charging them with cowardice, the speaker of Lysias 10 asserts: 'Indeed gentlemen of the jury, the more impressive and youthful my opponents are in appearance, the more they deserve your anger' (Lys. 10.29).

127 E.g. Dem. 42.24: 'There is one thing only, men of the jury, in which anyone could show that this man Phaenippus has been ambitious of honour from you: he is an able and ambitious breeder of horses, being young and rich and vigorous. What is a convincing proof of this? He has given up riding on horseback, has sold his war horse, and in his place has bought himself a chariot − he, at his age! − that he may not have to travel on foot; such is the luxury that fills him.' Cf. the arguments of the *dikaios logos* in Ar. *Clouds* l. 961ff.

128 See for e.g. Lys. 3.4: 'If I am guilty, gentlemen, I expect to get no indulgence; but if I prove my innocence as regards the counts of Simon's affidavit, while for the rest you consider my attitude towards the boy too senseless for a man of my age, I ask you not to think the worse of me for that, since you know that all mankind are liable to desire, but that he may be the best and most temperate who is able to bear its misfortunes in the most orderly spirit.'

129 See Ober (1989), pp. 226−30 and Davies (1981), pp. 88−132 respectively.

130 Millett (1998), p. 250.

131 See Donlan (1981−2), pp. 154−71; cf. Gill (1996), pp. 133, 139, 142, 145 et. al.

132 The fact that any such statement is absent from the Athenian court speeches is indicative. Gill (1996) explains on these terms the rejection by Achilles of the gifts of Agamemnon in *Iliad* 9. Agamemnon, severely breached the norms of reciprocity between chieftains and an acceptance of the gifts (by the method that Agamemnon chose) would unequivocally place Achilles in a position of inferiority.

133 Cf. Seaford (1994), Chs 3 and 6.

134 Christ (1998), pp. 92−3; cf. Lanni (2005), (2006), pp. 46−64. This argument was discussed earlier in this chapter.

135 Harris (2006a), pp. 66−72; cf. (2013a, 2013b).

136 Harris (2006a).

137 See the statistics in Johnstone (1999), p. 94. A close reading of the court orations indicates that the invocation of liturgies was not restricted to *timētaì díkai*. It is hardly

convincing to suggest that Athenian litigants, knowing that their liturgies were only relevant during a *timesi*s, would voluntarily and emphatically reveal their implicit purpose of distracting the jurors by asking them to betray their oath. The risk of alienating them would have been extremely high.

138 See for example Lys. 21.5; cf. Arist. *Rhet*. 1366b on magnificence and magnanimity as components of virtue.

139 See for example Antiph. 2.2.12; Lys. 7.25, 31, 41; cf. Lys. 19.56: 'I do this, not for mere vainglory, but to bring in as evidence the fact that the same man cannot both spend a great deal without compulsion and covet some of the public property at the gravest risk.' Dem. 52.26: 'Then we are to believe, in the first place, that he wronged a man who would be able to do him injury to twice the amount of his gains, and secondly that my father in this instance was a base lover of gain, whereas in regard to special taxes and public services and gifts to the state he was not.'

140 See for e.g. Dem. 21.158; Lyc. 1.139−40. Lycurgus in particular highlights the ethics of his troubled era by stating that the only useful liturgies at that time were the ones concerned with the war preparation of Athens against its enemies. cf. Lys. 31.12; Dem. 38.25; 42.3, 25.

141 Cf. Lys. 21.1; Is. 4.29−30 where the speaker alleges the forgery of the will presented by his opponent who, apart from being a denounced criminal, has never served the polis either with his property or with his person. The question at issue is one of fact, argumentation based on circumstantial evidence and probabilities. Furthermore, the issues decided during a *diadikasia* put the fate of the property at the centre of attention rather than concentrating on a specific legal offence. On the other hand, by reference again to a 'rule-case' type of reasoning, prosecutors could impute a plausible motive to their wealthy opponents (using their liturgies as evidence), such as that found in Antiph. 2.3.8.

142 The speaker at the beginning of his speech clarifies his intentions as to how he will try to persuade the jurors of his innocence: 'I will now try to explain to you who of the citizens are inclined, in my view, to court oligarchy, and who democracy. This will serve as a basis both for your decision and for the defence that I shall offer for myself; for I shall make it evident that neither under the democracy' (Lys. 25.7).

143 Imposition of a selfish end is not unusual in relation to public services, therefore it is anticipated; cf. Lys. 26.4: 'As regards the public services, I say that his father would have done better not to perform them than to spend so much of his substance: *for it was on account of this that he won the confidence of the people and overthrew the democracy*; and so our memory of these deeds must be more abiding than of the offerings he has set up in record of those services.'

144 Lys. 25.19, 31, i.e. the enemies-outsiders of the state who behave like oligarchs themselves and had offered pretences to the Thirty.

145 This stands in conformity with the Greek aristocratic values, according to which members of the elite undertake the expenses of the democracy and act as protectors of the demos.

References

ADKINS A.W.H. (1960), *Merit and Responsibility: A Study of Greek Values*, Oxford: Clarendon Press.

——— (1970), *From the Many to the One: a Study of Personality and Views of Human Nature in the Context of Ancient Greek Society, Values and Beliefs*, London: Constable.

BURKERT W. (2013), *Greek Religion: Archaic and Classical*, Chichester: John Wiley & Sons.

CAIRNS D.L. (1993), *Aidōs: the Psychology and Ethics of Honour and Shame in Ancient Greek Literature*, Oxford: Clarendon.

——— (1996), 'Hybris, Dishonour, and Thinking Big', *Journal of Hellenic Studies* 116, 1−32.
CHRIST M.R. (1998), *The Litigious Athenian*, Baltimore: Johns Hopkins University Press.
——— (2006), *The Bad Citizen in Classical Athens*, Cambridge: Cambridge University Press.
COHEN D. (1995), *Law, Violence, and Community in Classical Athens*, Cambridge: Cambridge University Press.
DAVIDSON D. (1980), *Essays on Actions and Events*, Oxford: Clarendon Press.
DAVIES J.K. (1981), *Wealth and the Power of Wealth in Classical Athens*, New York: Arno Press.
DONLAN W. (1981−2), 'Reciprocities in Homer', *Classical World* 75, 137−75.
DOVER K.J. (1974), *Greek Popular Morality in the Time of Plato and Aristotle*, Indianapolis; Cambridge: Hackett (1994), [Originally published Oxford: Blackwell, c. 1974].
FARENGA V. (2006), *Citizen and Self in Ancient Greece: Individuals Performing Justice and the Law*, Cambridge: Cambridge University Press.
FISHER N.R.E. (1976), *Social Values in Classical Athens*, London: Dent [etc.].
——— (1992), *Hybris: a Study in the Values of Honour and Shame in Ancient Greece*, Warminster: Aris & Phillips.
GILL C. (1995), *Greek Thought*, Oxford: Oxford University Press.
——— (1996), *Personality in Greek Epic, Tragedy, and Philosophy: the Self in Dialogue*, Oxford: Clarendon Press.
GRIFFITH J.A.G. (1997), *The Politics of the Judiciary* (fifth ed.), London: Fontana Press.
HANSEN M.H. (2006), *The Shotgun Method: The Demography of the Ancient Greek City-state Culture*, Columbia and London: University of Missouri Press.
HARRIS E.M. (2006a), 'The Rule of Law in Athenian Democracy. Reflections on the Judicial Oath', *Dike*, 9, 157−81 (= Etica e politica 9 [2007], 55−74).
——— (2006b), 'Solon and the Spirit of the Law in Archaic Athens', in E.M. Harris *Democracy and the Rule of Law in Classical Athens: Essays on Law, Society, and Politics*, Cambridge: Cambridge University Press, 3−28.
——— (2007), 'Did the Athenian Courts Attempt to Achieve Consistency? Oral Tradition and Written Records in the Athenian Administration of Justice', in C. Cooper (ed.) *Politics of Orality*, Leiden: Brill, 343−70.
——— (2009), 'What are the Laws of Athens About? Substance and Procedure in Athenian Statutes', *Dike*, 7/8, 2009/2010, 5−67.
——— (2013a), *The Rule of Law in Action in Democratic Athens*, New York: Oxford University Press.
——— (2013b), 'The Plaint in Athenian Law and Legal Procedure', in Michele Faraguna (ed.), *Archives and Archival Documents in Ancient Societies: Legal Documents in Ancient Societies IV, Trieste 30 September – 1 October 2011*, Trieste, EUT Edizioni Università di Trieste, 2013, 143−62.
JOHNSTONE S. (1999), *Disputes and Democracy: the Consequences of Litigation in Ancient Athens*, Austin, TX: University of Texas Press.
KONSTAN D. (1996), 'Greek Friendship', *The American Journal of Philology*, Vol. 117, No. 1 (Spring, 1996), 71−94.
——— (2000), 'Pity and the Law in Greek Theory and Practice', *Dike*, 3, 125−45.
——— (2003), 'Shame in Ancient Greece', *Social Research*, Vol. 70, No. 4 (winter 2003), 1031−60.
LANNI A. (2005), 'Relevance in Athenian Courts', in M. Gagarin and D. Cohen (eds), *Cambridge Companion to Ancient Greek Law*, 112−28, Cambridge: Cambridge University Press.

——— (2006), *Law and Justice in the Courts of Classical Athens*, Cambridge: Cambridge University Press.
——— (2009), 'Social Norms in the Courts of Ancient Athens', 9. *Journal of Legal Analysis*, 691.
LEWIS N. (1960), *Leitourgia and Related Terms*, GRBS3, 175−84.
MACDOWELL D.M. (1962), *On the Mysteries / Andokides; the Text Edited with Introduction, Commentary and Appendixes by Douglas Macdowell*, Oxford: Clarendon Press.
——— (1976), 'Hybris in Athens', *Greece and Rome* 23 (1976), 14−31.
MACINTYRE A. (1985), *After Virtue: A Study in Moral Theory*, London: Duckworth (second ed.).
MILLETT P. (1998), 'The Rhetoric of Reciprocity in Classical Athens', in C. Gill, N. Postlethwaite and R. Seaford (eds), *Reciprocity in Ancient Greece*, Oxford: Oxford University Press, 227−53.
MITCHELL L.G. (2002), *Greeks Bearing Gifts: The Public Use of Private Relationships in the Greek World, 435−323 BC*, Cambridge: Cambridge University Press.
MUNDAY R. (2005), 'What Constitutes "Other Reprehensible Behaviour" under the Bad Character Provisions of the Criminal Justice Act 2003?', *Criminal Law Review* 2005, JAN, 24−43.
NAIDEN F.S. (2004), 'Supplication and the Law', in E.M. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, London: Duckworth, 71−91.
OBER J. (1989), *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People*, Princeton, N.J.: Princeton University Press.
RADEMAKER A. (2005), *Sophrosyne and the Rhetoric of Self-Restraint: Polysemy & Persuasive Use Of An Ancient Greek Value Term* (Mnemosyne Supplements), Leiden: Brill Academic Pub.
ROISMAN J. (2005), *The Rhetoric of Manhood: Masculinity in the Attic Orators*, Berkeley: University of California Press.
RUBINSTEIN L. (2000), *Litigation and Co-operation: The Use of Supporting Speakers in the Courts of Classical Athens*, Stuttgart: F. Steiner Verlag. (Historia Einzelschriften; vol. 147.)
——— (2004), 'Stirring up *Dicastic* Anger', in D.L. Cairns and R.A. Knox (eds), *Law, Rhetoric and Comedy in Classical Athens: Essays in Honour of Douglas M. MacDowell*, Swansea: Classical Press of Wales, 187−203.
——— (2005a), 'Differentiated Rhetorical Strategies in the Athenian Courts', in M. Gagarin and D. Cohen (eds), *The Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press, 129−45.
——— (2005b), 'Main Litigants and Witnesses in the Athenian Courts: Procedural Variations', in M. Gagarin and R. Wallace (eds), *Symposion 2001: Vorträge zur griechischen und hellenistischen Rechtsgeschichte.* Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 99−120 (Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte; vol. 16), 99−120.
SAUNDERS T.J. (1991), *Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology*, Oxford: Clarendon.
SEAFORD R. (1994), *Reciprocity and Ritual: Homer and Tragedy in the Developing City-state*, Oxford: Clarendon Press.
SNELL B. (1953), *The Discovery of the Mind: the Greek Origins of European Thought*, Oxford: Blackwell.
TODD S.C. (2008), *A Commentary on Lysias, Speeches 1−11*, New York: Oxford University Press.
WILKES K. (1988), *Real People: Personal Identity Without Thought Experiments*, Oxford: Clarendon.
WILLIAMS B. (1993), *Shame and Necessity*, Berkeley: University of California Press.

6 Purposes of character evidence in the courts of Athens – predominance of law or rhetoric?

The preceding chapter demonstrated how the Greek perceptions of 'personality' influenced and fertilised argumentation in Athenian courts. Specifically, it was shown that these ideas explain the (by modern standards wide) use of character evidence and render it relevant to the legal charge in question. Setting aside the psychological and anthropological analysis of the previous chapter, a more legalistic explanation of this kind of rhetoric in Athenian courts may be offered. Certainly, according to the prior analysis, the methods of giving character evidence (Chapter 4) were dictated by the Greek ideas of character (as set out in Chapter 3). Furthermore, the Greek way of practical reasoning and ethical motivation (Chapter 5) provides the model of interpretation for the forensic speeches, rendering groundless any analysis influenced by modern presumptions of relevance or the rule of law. However, apart from the obvious purpose of arguing convincingly the particular legal case, character evidence had secondary purposes as well. These aims, based on legalistic and rhetorical grounds, provide critics of the Athenian law with fertile ground for harsh conclusions, arguing that these secondary purposes aimed at the distraction of jurors from the legal case. However, what is understood today as extra-legal argumentation neither obstructed legal justice nor inhibited the jurors' rational legal judgment.

The first part concerns the use of character evidence regarding issues of strict law, such as the speaker's fundamental aim of proving his adversary's propensity. Also, discussion of the (sometimes misinterpreted and blamed) genre of forensic rhetoric is essential, since it triggers harsh criticisms about the nature of Athenian law. The tensions between law and rhetoric have been shaped since antiquity by the work of Aristotle '*On Rhetoric*'. Scholars have come up with sharp reproaches about the ways that the orators tried to manipulate popular juries. This approach is aggravated by a presumption that the latter were inclined to give verdicts based on emotional considerations. Character evidence touched upon these emotions. Finally, supplementary factors such as the speakers' credibility and the goodwill of the audience need to be evaluated.

'Character' in strict law – propensity

The most 'legal' use of character evidence is intended to answer questions of guilt. Even in modern days, the propensity of the accused to commit the specific crime in question serves the legitimate purpose of proving or disproving guilt. This can also be achieved by aggrandising his blameworthiness due to his more general way of living. In classical Athens, analogous efforts of proving a person's (particular or general) criminal disposition are evident in the speeches. Yet, their scope was wider as they were extended to the accuser (especially in terms of having a propensity to bring malicious prosecutions and, therefore, act as a sycophant. As has been demonstrated in previous chapters, for the Athenians, a presentation of a series of past acts could securely reveal a person's general disposition, and thus should be given more weight than words at the time of trial.[1]

The issue of propensity occupied the work of thinkers at least from the fifth century BC. Aeschines insisted that past acts can predict future behaviour.[2] His whole prosecution speech against Timarchus consisted of a combination of specific indecent examples from the defendant's life and references to his general reputation. Using an inductive method of reasoning, Aeschines argues that Timarchus' appetite for lust, gluttony and hubris proved his general propensity for criminal and indecent behaviour.[3] The prosecutor of Lysias 14, in anticipating the defendant's plea for acquittal due to his previous honourable acts, proceeds to a series of allegations against him, highlighting his indecent and disorderly (private and public) behaviour, in order to conclude that

> Indeed, there is nothing that they have been spared, or have spared. For, their propensity is to be ashamed of what is honourable and to glory in what is base.[4]

On the other hand, defendants could also use similar argumentation in order to prove a prosecutor's propensity for bringing sycophantic suits:

> I think, then, men of Athens, that nothing could be more to the purpose than to bring forward witnesses to these facts. For if one is continually making baseless charges, what can one expect him to do now?[5]

In fact, this quote perfectly complies even with a modern court's rules of relevance, in the sense that it refers specifically to a person's past offences of the exact same nature as the alleged crime. The Athenians were more than capable of assessing the degree of relevance of a past act, overwhelmingly promoting the most relevant at the expense of the most remote.[6] Therefore, both the quantity of a litigant's past acts and the quality in terms of gravity and relevance to the particular case, played a major role in an orator's decision as to whether and when such arguments should be adduced.

The adversarial nature of an Athenian trial meant that propensity arguments could also be adduced, especially by defendants, in order to highlight the positive side of their character. A defendant who led an orderly life, performing honourable

deeds or liturgies for his fellow citizens, had proved his merits and his inclination to act in a good manner. In fact, their goodwill towards the polis and their fellow citizens could have been dispositional rather than opportunistic.[7] For example, the speaker of Lysias 19 exclaims that the account and accomplishments of his father's whole life overwhelmingly prove that he never acted because of greed and he never had the propensity for such a flaw.[8] The prosecutors, on the other hand, focused on their lack of propensity for excessive litigiousness, which could lead to the serious allegation of sycophancy. Almost every prosecutor alleges his inexperience in legal matters. Whenever possible, he argues that it is actually the first time he attends a court, the fault being the defendant's since he was obliged to bring a public suit due to the latter's grave illegality.

What may be extracted regarding the probative value of character in revealing propensity in Athenian courts is that it does not differ sharply from modern ideas. The nature of Athenian trials and the ideology of the period permitted a less offence-focused argumentation, embracing other matters such as litigants' positive or negative former acts. Nevertheless, the essence of argumentation was the revelation of a litigant's character traits in relation to the legal case at hand. Proving propensity to commit (or not to commit) a particular crime was their utmost aim, no matter whether, compared to the moderns, the Athenians used more (and sometimes slightly different) paths for achieving this. The reasons for the trivial deviations from the modern norm are mainly to be attributed to the Greek ideas of character discussed in previous chapters, but again, these prove that both litigants and jurors regarded such argumentation as relevant to their case.

'Character' in rhetoric – persuasion, credibility and goodwill

Although this topic has been treated extensively, the multitude of divergent views and interpretations of the ancient sources calls for a fresh, more straightforward view of the controversial issues. Treatment of the secondary (less legal) uses of character evidence is essential, since it has provided a superficial justification for researchers who reject the implementation of the rule of law by the Athenian courts. Based on the views of some Athenian writers,[9] scholars have placed disproportionate weight on the rhetorical uses of ad hominem argumentation, deducing that the courts slipped into an extra-legal way of decision making. Their conclusions that litigants based their pleas on irrelevant matters led them to the inference that the Athenian courts downplayed their legal role, primarily serving other, mainly socio-political roles.[10] To what extent is such a statement valid that character evidence chiefly played an extra-legal role? Were the aims of rhetoric, especially as presented in the law-courts, incompatible with legal argumentation? Is the modern researchers' view influenced by the bias of ancient writers? These questions set the axes of the forthcoming discussion.

As has been demonstrated, apart from the strictly legal use of character evidence (the proof of propensity), argumentation from character may also be used for other, secondary reasons. These include the effort to enhance the credibility

and trustworthiness of a speaker, and to gain the goodwill of an audience through ethical and / or emotional pleas. Especially in the enormously adversarial environment of the Athenian law courts, which was sometimes susceptible to such argumentation, the extent of these secondary, extra-legal aims acquires additional significance. Keeping in mind the high stakes in the majority of the surviving Athenian trials, litigants could resort to all acceptable means in order to convince the jury and reach their ultimate goal: victory.[11]

Nevertheless, the experience of Athenian jurors and the fact that any mistake would be exposed by the adversary, provided a framework for a speaker's acceptable rhetoric. The absence of professional lawyers meant that the amateur Athenian litigant would have to deal with every step of a trial. Most importantly, it is suggested that, in principle, a litigant was required to speak for himself.[12] That created a twofold issue: either someone would have to face the realities of amateurism and commit (very) costly mistakes or he would professionalise the job either by hiring a professional logographer[13] or by studying the secrets of rhetoric himself.[14] As a result, sophists, philosophers and professional speechwriters competed in trying to find the nature of persuasion and composing numerous theoretical and practical treatises on rhetoric.[15]

Undoubtedly, our view of rhetoric has been shaped by Aristotle. The penetrating thought of the Stagirite and his enormous ability in classification has haunted the study of rhetoric since antiquity.[16] In the *Rhetoric* he classifies the different kinds of proofs (*pisteis*) as artful (*entechnoi*) or artless (*atechnoi*) depending on whether they belong in the province of rhetoric, i.e. whether they have been invented by the orator or they were already in existence. Artless (*atechnoi*) *pisteis* include witnesses, tortures, contracts, laws, and the like (being there at the outset), while artful (*entechnoi*), which concern us here, include those proofs that must be devised by the rhetorician, such as the depiction of moral character, emotion, and argument (*Rhet*. 1355b35ff.). Although the effects of persuasion through moral character (*ethos*) and emotion (*pathos*) may often be said to overlap,[17] Aristotle does not support such a conclusion regarding forensic rhetoric. As a result, e*thos*, *pathos*, *eunoia* (goodwill) and *axiopistia* (credibility, trustworthiness) need further clarification.

Aristotle's *Rhetoric*, due to its 'intellectual approach' to the subject,[18] has created disputes and misinterpretations. For Aristotle, the importance of *ethos/pathos* argumentation should be attributed to the inadequacy of the audience and the weaknesses of the system which permitted such aberrations.[19] Although Aristotle admires systems which strictly prohibit speaking outside the issue and pass laws so inclusive that they leave nothing to the discretion of the dicasts, evidently this is hardly realistic. Most legal systems have to accommodate an open texture in their laws, thus room is left for the rhetoricians to develop their strategies. Usually these include resorts to emotional pleas, by utilising methods of putting judges into a certain frame of mind. As a result,

> in their case love, hate, or personal interest is often involved, so that they are no longer capable of discerning the truth adequately, their judgment being obscured by their own pleasure or pain (Arist. *Rhet*. 1314b).

Such rhetorical devices 'are outside the question, for they are only addressed to a hearer whose judgment is poor and who is ready to listen to what is beside the case' (Arist. *Rhet*. 1415b). Nevertheless, not all judges are such, and Athenian judges definitely did not lack the experience or the mental capacity to uncover rhetorical tricks.[20] It must be noted that Aristotle particularly refers to *emotional pleas* which, as will be shown later, have (to an extent) to be distinguished from character evidence. However, an all-inclusive approach is usually followed, inaccurately citing Aristotle as hostile to any kind of rhetorical argumentation as inconsistent with law,[21] rendering mass juries incapable of regulating extra-legal references.

Aristotle distinguishes between *ethos* and *pathos* argumentation, yet defining the respective boundaries admittedly is a complex task. Having said this, a further question complicates the matter even further: why did Aristotle, contrary to his suggestively negative opinion of rhetoricians who placed too much weight on the treatment of emotional appeals, devote a substantial part of the *Rhetoric*'s Book II to the analysis of 'non-essentials' like emotions and types of personality? This may be explained as an inconsistency of approach (doubtful when referring to Aristotle) or as a practical division of Aristotle's approach to rhetoric as 'idealistic' and 'realistic'.[22] Could there be another explanation for this? Aristotle's hostility is directed against the immense degree and the quality of emotional pleas suggested by his intellectual opponents. Aristotle is not unvaryingly hostile to character evidence or balanced emotional pleas which do not hinder the rational ability of the receiver, although he knows that these may sometimes be interpreted as irrelevant.

In Aristotle, *ethos* has the speaker as the point of reference. Its nature is primarily ethical or moral and its method of argumentation is usually the self-presentation of the speaker.[23] Aristotle is definitely not inimical to this type of argumentation and acknowledges its importance. The accounts of Aristotelian persuasion through character can be found in chapters 1.2 and 2.1 of the *Rhetoric*. According to Fortenbaugh, the first refers to judicial settings and the second to deliberative.[24] In his view, in forensic environments the speaker must show *epieikeia* (uprightness of character) which parallels moral virtue (Arist. *Rhet*. 1377b 25−6). *Ethos* here refers to moral disposition, as distinct from deliberative settings in 2.1, where it is supplemented by the speaker's reference to his deliberative capacities (wisdom, *phronesis*) and the demonstration of his goodwill towards the audience. Nonetheless, the rhetorical practice of the Athenian courts indicates that this traditional (Homeric) tripartite persuasion (wisdom, virtue, goodwill) was present in full in the law-courts.[25] Apart from the surviving speeches, this tripartite division is also verified by Anaximenes of Lampsacus in the rhetorical treatise *Rhetorica ad Alexandrum* (1436b 22−6).

As shown in Chapter 5, Greek ideas of ethical motivation dictated that in order for an orator to be successful (especially in the portrayal of character), account must be taken of the beliefs and values of the audience he wants to persuade.[26] In that respect, character is of utmost importance and 'may almost be called the most effective means of persuasion he possesses' (Arist. *Rhet*. 1356a 10−14). A person's *axiopistia* (credibility) depends on convincing the audience of his adherence to popular norms; moral character needs to be presented accordingly. For Aristotle,

this impression of a person's *ethos* is created through the *entechnoi pisteis* in the speech and achieved through the skilful use of language, not by what people think of him before he begins to speak (*Rhet*. 1356a 8−10). Appropriate arguments, style and delivery, in a manner that is *prepon* (fitting) to the speaker, are necessary to create a particular impression of the speaker's character for the audience. In contrast, Isocrates refers to a speaker's *ethos* as something achieved throughout one's life, i.e. his prior reputation (Isocr. 15.278). This can be said to be more effective in face-to-face communities (not rejected in principle by Aristotle). Nevertheless, Aristotle's remarks fit better with Attic oratory where speakers, regarding presentation of character, relied to a great extent on rhetoric. Careful argumentation was employed in order to highlight or darken the more or less advantageous details relating to an event (even a well-known one), to eulogise one's past acts in proving an upright way of life, to advertise one's goodwill towards the audience, the polis and its norms. As has been recently argued, 'the aspect of character was perhaps relatively straightforward in Athenian oratory because in the law courts defendants spoke on their own behalf; advocacy . . . greatly complicated the use of character'.[27]

Persuasion through *pathos* has different implications. Here, the centre of attention departs from the speaker and focuses on the hearer. From 'persuasion through the speaker's character' it becomes 'persuasion through the hearers' emotions'. In particular, the orator develops ways and methods that could produce the desired emotional effect on his audience. Emotional appeals had been very popular with the writers of rhetorical handbooks, forming the central theme of their treatises. Aristotle, although he recognises the importance of the audience's emotional condition (*Rhet*. 1377b 21−31), nevertheless remains hostile to such practices, though not universally.[28] His negative remarks form a reply to the writers who have themselves *overstated* the importance of emotional appeals, presumably at the expense of legitimate strictly legal argumentation and character evidence.[29] But to what extent does Aristotle's treatment of emotion differ from that attributed to other writers? And to what extent may it be said that emotional appeal was relevant and successful in Athenian courts?

Emotional pleas have always been regarded as targeting the impulsive, irrational parts of the human mind and soul, thus hindering its ability for rational thought. On the other hand, Aristotle's treatment of emotions in the *Rhetoric* 2.2−2.11 explains the tie between belief and emotion, intending to show that *human emotions can be based on the outcomes of rational calculation.* This approach is original and explains Aristotle's approach to emotional argumentation. Such argumentation need not aim at arousing illogical reactions but should provide grounds for trust without undermining the impartiality of the audience.[30] In other words, such argumentation about the moral uprightness of a litigant's character which provides reasons for reasoning (and as a result may cause mild emotional reactions), differs sharply from what Aristotle's adversaries advised their readers. Their kind of argumentation, according to the Stagirite philosopher, was outside the issue, referring to extraneous matters, undermining the audience's impartiality and critical thinking. In this way the audience, which was provoked to feel pleasure and pain, was directly affected in judgment (cf. *Rhet*. 1377b 31−1378a6; 1378a 20−1).

On the contrary, *argumentation producing sensible emotional responses based on beliefs and reasoning retains its legitimacy since it does not hamper the audience's straight judgment.*

The preceding paragraphs have indicated yet another critical point concerning ethical and emotional argumentation. Aristotelian persuasion through character is not intended to arouse emotional reactions in the audience. The uprightness of one's moral character provides reasons for trusting the speaker, without undermining the audience's judgmental ability. Presenting good character by showing adherence to widely accepted norms and beliefs can be a way of making oneself credible (*axiopistos*), significantly contributing to persuasiveness by legitimate means. Second, this kind of argumentation may overlap with (or be seen as) emotional pleas which, again, need not be illegitimate and irrelevant. What may be called trustworthiness, when focusing on the speaker, can also be called goodwill (*eunoia*), when focusing on the audience's response. However, the triggering act remains the same: the speech and the argumentation which provide reasons for a cognitive procedure leading to the aforementioned results. Lastly and unfortunately, emotional argumentation may be unrefined and irrelevant, aiming at arousing crude responses in the unsophisticated mob, thus undermining rhetoric and justice per se.[31] To conclude then,

> a prose orator either can appeal to his audience to view his figures in an 'ethical' way, as characterised agents, whose moral or personal qualities are presented for calm and rational assessment. Or he can aim at a more intuitive response, inducing his audience to share his figures' emotions or to respond to the *pathos* of their situation, with very limited critical or ethical detachment.[32]

In the course of the above discussion reference has been made to goodwill (*eunoia*), which also needs some clarification. The issue of securing the goodwill of the audience was crucial and common to all litigants. In all parts of a speech, from the *prooemium* to the *epilogue*, speakers aimed at establishing concord with their hearers[33] simultaneously undermining their opponent's chances of success. Either through the presentation of their own (dispositional or occasional) goodwill towards their hearers or through the presentation of their *ethos* or *pathos*, speakers sought for a mild and impartial or an intensely emotional and partial kind of goodwill. As a result, four meanings of *eunoia* are present in the law courts.

First is a speaker's goodwill towards his polis (represented by the jurors), which could be revealed through his *ethos*, by arguing that his *philia* towards his polis and compatriots is an established disposition, a character trait acquired through his civic *paideia*. Past services to his polis, enumeration of liturgies and other benefactions, and a more general adherence to the norms of the audience as a proof of civic virtue,[34] formed patterns of argumentation in Athenian courts. Regardless of whether the jurors' *charis* (gratitude) was sought by referring to such arguments, the essence remains the use of the Homeric tripartite division (virtue-wisdom-goodwill) in order to secure the *eunoia* of the audience. On the other hand, a speaker's goodwill could be proved by more emotional argumentation.

In reference to occasional, spontaneous reactions which, though not proving an established character, could nonetheless prove emotional attachment to his polis. He may invite the audience to share the *pathos* he felt during such moments and respond accordingly. Therefore, both *ethos* and *pathos* could be adduced in a litigant's speech in order to advertise his goodwill.[35]

As far as the *eunoia* of the audience is concerned, again this might be divided into two kinds: mild and passionate. The audience may react in an unemotional way, acknowledging the trustworthiness of a speaker and attributing a fair amount of credibility, though retaining their impartiality and critical thinking in order to reach a just result. It was a rhetorical *topos* to ask for the *eunoia* of the audience (especially in the *Prooemium* of a speech). This kind of goodwill equated to fair hearing rather than an invitation to the jurors to behave contrary to their oath, in an emotional, biased manner. In fact, there was nothing to prevent an audience from feeling goodwill toward all speakers, even though the speakers were opposed to each other. That is what Isocrates calls 'common good will' (*koine eunoia,* Isoc. 15.22).[36] On the other hand, goodwill may reach its climax and imitate 'friendship',[37] inducing the audience to more passionate and partial responses.[38] Although this was prohibited by the Heliastic oath (Dem. 24.151), the mere presence of such a clause in the oath reveals the existence of the problem. The most famous and characteristic example comes from a speech delivered by Apollodorus (Dem. 45) against Stephanus for false testimony, in prolongation of a trial between himself and his stepfather Phormio. Apollodorus says that his opponent

> made such an impression on the jury that they refused to hear a single word from me: I was fined one-sixth of the amount claimed, was denied the right of a hearing, and was treated with such contumely as I doubt if any other man ever was, and I went from the court, men of Athens, taking the matter bitterly and grievously to heart (Dem. 45.6).

Although such episodes may be described as 'aberrations from the norm' where the court 'have yielded to emotional appeals and failed to perform their duty of upholding the law',[39] they nonetheless highlight the untypical emergence of passionate goodwill towards one of the parties, reaching the extent of prejudice. After all, this is what Aristotle detested the most.

From the above evidence it is revealed that the popular conclusion regarding emotional pleas and prejudice in Athenian courts, i.e. litigants digressing to irrelevant argumentation, thus hindering the correct execution of justice, is oversimplified and may not be so accurate after all. Especially when referring to Aristotle, modern researchers must be very careful in citing his *Rhetoric* for support. Regarding the court speeches in particular, new studies have shown that emotional argumentation could in truth damage a speaker's case. In her study on dicastic anger, Rubinstein has noted that emotional pleas needed to be carefully checked, having different, proper degrees of intensity.[40] Depending on the type of the case and the composition of the audience, speakers had to adjust their argumentation, avoiding emotional extremities. Similarly, Bers argues that professional speech in

the courts of classical Athens aimed at the restraint of the speaker's affect, thus correcting a common mistake of amateur speakers. In his words 'an individual amateur litigant, lacking the logographer's restraining hand, would more likely yield to his emotions and allow his rage to break out, thereby offending his judges and harming his case'.[41] The changing attitudes in Athenian society, namely the transition from the approval of anger, rage and aggressive emotions of the heroic age to their restraint due to the emergence of cooperative values such as moderation and self-control, ordained similar behaviour in the courts of law.[42] Evidently, this is not to suggest that emotional pleas were abandoned or even condemned;[43] however, the emergence of a new ethics was at hand, once more rendering easy conclusions concerning the Athenian legal system inappropriate.

Our final consideration in this effort for clarification of rhetorical terms concerns *axiopistia* (credibility, trustworthiness). Credibility concerns the believability of the person, either litigant or witness. The strict legal application of the notion of credibility relates to the testimony of a witness or party during a trial. Testimony must be both competent and credible if it is to be accepted by the tester of fact as proof of an issue being litigated. Also, the credibility of a witness or a litigant who testifies about the facts in issue or facts relevant to the issue[44] decides the weight that a testimony deserves. Overall, a trustworthy and respectable speaker enhances his chances of success.

Aristotle in *Rhetoric* (1356a) links credibility with character:

> The orator persuades by moral character when his speech is delivered in such a manner as to render him worthy of confidence; for we feel confidence in a greater degree and more readily in persons of worth in regard to everything in general, but where there is no certainty and there is room for doubt, our confidence is absolute. But this confidence must be due to the speech itself, not to any preconceived idea of the speaker's character; for it is not the case, as some writers of rhetorical treatises lay down in their "Art," that the worth of the orator in no way contributes to his powers of persuasion; on the contrary, moral character, so to say, constitutes the most effective means of proof.[45]

By the same token, counter-attacking the adversary and assassinating his moral character is equally recommended: for it would be absurd to believe the words of a speaker who is unworthy of belief (Aristot. *Rhet*. 1416a). These conclusions had been reached by earlier orators as well. Antiphon, in one of the earliest surviving speeches observes that 'when there are no witnesses, you are forced to reach a verdict about the case on the basis of the prosecutor's and defendant's words alone'[46] so the jurors 'must examine what each side swore and decide which of us was more truthful and swore more correctly'.[47] Andokides, in his defence speech, repeatedly tries to attack the credibility of the prosecutors, by referring to allegations of dishonesty and sycophancy. Projecting his own beliefs onto the jurors he continuously uses phrases such as 'you know what sort of men they are . . .'[48] in order to diminish the credibility of his opponents. The examples are numerous and occur in almost every extant speech, even in cases where the court had to decide

on an inheritance, where the claims were equal and the structural unsymmetrical adversarial nature of the trial was nullified. Similar efforts can be found in Lysias. The prosecutor on the scrutiny of Evandrus acknowledged that 'It is your business, gentlemen of the Council, to inquire whether you will reach a better decision in the matter of this scrutiny by listening to me or to Thrasybulus, who will defend this man'.[49]

Character and emotions in Athenian courts

The previous section demonstrated the, in principle, unjustified universal condemnation of emotional appeals as inconsistent with rational judgment and irrelevant to the legal case. This approach is heavily influenced by the post-Kantian assumptions of a 'reason – passion' contrast, with the first requiring total abstraction and detachment and being, as a result, incompatible with the second. The Greeks however narrate a completely different story.[50] For them, human emotions and desires are informed by beliefs and reasoning. A person's emotional world is totally dependent on and informed by contextual stimuli, such as cultural presumptions and upbringing. In other words, *pathos* is taken to be 'rational' in the sense that it is based on a cognitive evaluation of a particular situation; the person, drawing on preconceived ethical beliefs and stereotypical assumptions instilled on him by the environment, reacts with a proper response, i.e. feeling the proper emotion.[51] Therefore, the Greek ideas of personality and the human mind discussed in Chapter 5, illuminate this problematic case as well. The 'objective / participant' human being's emotional responses (as well as human action) are formed by his ethical judgments, leading to a rational – *cum* – emotional consistency. As a result, patterns of emotional response are created which can then be evaluated and received as acceptable or unacceptable by reference to shared ethical standards for such responses.

This is evident in Athenian courts. *Appeals to pity* are not uncommon in the forensic speeches, especially of the defendants. But did these appeals prejudice the jurors unfairly, affecting their ability to reach a rational and just decision? Regardless of the underlying motives of the speakers, such emotional appeals were not inconsistent or incompatible with rational judgment. Pity was asked of the jurors as the *proper emotional response to the particular situation of the innocent defendant*. Based on the proper beliefs (as presented by the defendant), the correct reasoning and evaluation of the particular case would lead the jurors to acquit the appealing litigant, simultaneously showing the proper emotive reaction of pity. *Unmerited suffering* is the key phrase that denotes the proper understanding of the emotion of pity in classical Athens.[52] Pity follows the rational judgment of unjust suffering. The cognitive dimension of the emotions is thus evident. In addition to the psychological element, structural considerations also contribute to this compatibility between the emotional appeals to pity and the rational evaluation of the particular legal case. The cognitive dimension is demonstrated by the establishment of a relationship between the jurors and the litigant, whereby the latter exemplified (either through words or enactment) his submission and trust to

the power of the demos,[53] asking for its proper emotional response.[54] Finally, this emotional appeal's very reasonable and targeted usage in cases of high importance, and especially when the preservation of an *oikos* was at stake, is noteworthy.[55] Its proper and targeted use signifies the very 'rationality' of its application.

As far as *appeals to dicastic anger* are concerned (although as an emotion diametrically antithetical to pity) the same patterns emerge.[56] Aristotle defines anger as 'a desire, accompanied by pain, for a perceived revenge on account of a perceived slight' (Arist. *Rhet*. 1378a31−2). Appeals to anger or rage (*orge*) (which, as an emotion is triggered by the relevant beliefs that produce it) [57] are always coupled with the guilt of the opposing party. The argument is context-sensitive and is only adduced in public cases (*graphai*) or in *dikai* where the legal offence called for the punishment of the perpetrator (signified by the verbs *kolazein* or *timoreisthai* and their derivatives).[58] Appeals to *orge* are invoked (in accordance with Aristotle's analysis in the *Rhetoric*) against a specific individual only where the person appealed to feels that he has been injured personally. By contrast, *misos* is represented as an emotion that can be directed against an entire category of people, without presupposing a feeling of personal injury.[59]

The perfect rationality of these emotions and their usage in Athenian courts is therefore evident. In Rubinstein's words:

> what held speakers back from appealing openly to *dicastic orge* in *dikai* may have been their fear that such appeals might back-fire, because their claim that their case was of common concern simply would not have seemed plausible enough for the *dicasts* to accept that line of explicit emotional argumentation.[60]

Finally, it is noteworthy that Athenian defendants never tried to assuage the jurors' stirred anger through an expression of remorse or repentance because this would simply mean admission of guilt. However, if they believed that the jurors voted because they were carried away by their emotions rather than according to their oath, such efforts might have been present, for the simple fact that their admission of guilt would not automatically condemn them (since the jurors would assess extraneous considerations) and the (more influencing) appeals to emotions would provide them with a better chance.

Shame[61] (*aidos* or *aiskhune*) is the emotion of 'pain or disturbance concerning those ills, either present, past, or future, that are perceived to lead to disgrace, while shamelessness is a disregard or impassivity concerning these same things' (Arist. *Rhet*. 1383b12−14). This emotion is prompted by three elements: a particular disgraceful act, the fault of character that is revealed by the act, and the (real or imagined) loss of esteem brought about as a result before the community at large. As becomes evident, shame before the community presupposes an adherence to and internalisation of conventional ethical norms. This is demonstrated by proper courses of action, whose breach would be perceived as reprehensible by the community and would trigger negative judgments against and disgrace for the agent. The fact that this reaction by the community can even be hypothesised or imagined reveals the significance of this process of internalisation for the emotion

of shame.[62] Shamelessness, on the other hand, entails either the agent's indifference as to his reputation or the lack of knowledge as to which acts or character traits are disgraceful. This latter aspect is brought forward in the forensic speeches.

Shamelessness in Greek orators is directed against an opponent whose conduct and previous acts prove indifference or contempt as to the conventional ethical norms. Shame is the indicative emotion which renders an agent adherent to or unreceptive of the community's values. Hubristic, arrogant conduct is coupled with shamelessness.[63] A shameless person is one who 'has not stopped short of the utmost limits of depravity'.[64] For example, in relation to misuse of the laws and sycophancy, Demosthenes asks Aeschines 'Are you not ashamed to prosecute for spite, not for crime?'[65] Any breach of communal norms coupled with the agent's lack of shame proved the latter's lack of internalisation of ethical norms, rendering himself an ethical outcast of the community (Chapter 5). On the other hand, a speaker's silencing of the opponent's exceptionally reprehensible and indecent acts reveals his unequivocal adherence to the community's morals[66]. Phrases such as 'I am ashamed to say how mean and shabby they are'[67] are not uncommon. The most indicative example comes from Aeschines:

> Now the sins of this Pittalacus against the person of Timarchus, and his abuse of him, as they have come to my ears, are such that, by the Olympian Zeus, I should not dare to repeat them to you. For the things that he was not ashamed to do in deed, I had rather die than describe to you in words *(ἃ γὰρ οὑτοσὶ ἔργῳ πράττων οὐκ ᾐσχύνετο, ταῦτ' ἐγὼ λόγῳ σαφῶς ἐν ὑμῖν εἰπὼν οὐκ ἂν δεξαίμην ζῆν*. (Aeschin. 1.55).

The 'rationality' of this emotion and the 'reasonable' outcomes it causes are obvious.

Finally, the emotion of *envy* shifts the centre of attention to the jurors.[68] Aristotle defines this (*Rhet*. 1386b18−20) as a painful emotion arising from the prosperity of a person who is 'similar' to us, thus produced by an unfavourable comparison with someone who seems to possess something that we lack. Although the 'rationality' of this emotion and its grounding in the agent's beliefs and reasoning are evident, further analysis is due. Apart from concentrating on techniques of inoffensive self-praise before a mass audience (these techniques acknowledging the 'rationality' of the emotion, aiming at cancelling or substituting the beliefs or the reasoning that provoke it), the main aim here is to demonstrate the role of liturgies in neutralising the jurors' potential envy. In Chapter 5, the multidimensional role of the invocation of liturgies has been demonstrated. These findings may be supplemented with the interpretation of this practice as potential obstruction to the arousal of envy.

The enumeration of liturgies, instead of being a method of distracting the jurors from the particular legal offence, may be contrastingly seen as a method of keeping them focused on the point. Having the certainty that the adversary of a wealthy litigant would try to excite the envy (and suspicion) of the jurors against him, the latter, by enumerating his liturgies, reveals his public-spiritedness and asks them not to decide the case by reference to irrelevant motives. In order to achieve this,

he refers to his public expenditure as generous sop sharing[69] or even true sharing. The speaker of Lysias 19 exclaims:

> Consider, as you survey the time that is past, all that is found to have been spent on the city: at this moment, too, I am equipping a warship from the residue; my father was equipping one when he died, and I will try to do what I saw him doing, and raise, by degrees, some little sums for the public services. Thus in reality it continues to be the property of the State (Lys. 19.62).

Envy, although an emotion, was again treated as 'rational' deriving from relevant beliefs and a course of reasoning. Appeals to emotion were not incompatible with rational consideration of the legal case; rather they reinforced it by reference to a different kind of reasoning.

Conclusion

Aristotle in the *Nicomachean Ethics* evaluates the quality of a person's emotional response and its relation with virtue by reference to the mean (*to meson*). He provides that

> [. . .] to feel [fear and confidence and appetite and anger and pity and, in general, pleasure and pain] at the right time, with reference to the right objects, towards the right people, with the right motive, and in the right way, is what is both mean [meson] and best, and this is characteristic of virtue (1106b21−3).

The Athenian legal system, as presented in the speeches of the orators, encouraged litigants to use character evidence and appeals to emotion in a similar, rational manner. Proper emotional responses were triggered with regard to the right persons, at the correct time (in *dikai*, *graphai* etc.), with the appropriate reaction in the form of a legal verdict, always combining written law and justice. Behavioural patterns were thus formed and propagated by the jurors and the court (acting as a section of the demos, therefore as a coherent ethical sub-community) in the Aristotelian way, whereby a virtuous community propagates its ethical beliefs (as discussed in Chapter 5) and the appropriate emotional responses (Chapter 6). In this way the court, through its verdicts, structurally acted as the educator of the polis, testing, reinforcing and propagating the correct ethical motivation, reasoning and emotional reaction of the citizens.

Contrary to the popular perception regarding the susceptibility of Athenian courts to irrelevant considerations, the above discussion has proved that *ethos* and *pathos* argumentation could be relevant and legitimate in a forensic setting. Aristotle particularly acknowledged character evidence as the most important aid in arguing a case. The surviving speeches prove that this was true for the protagonists of the Athenian legal system as well. Moreover, emotional pleas could also be relevant and legitimate, provided that they were disciplined and balanced. Athenian jurors, with minor aberrations, were experienced and thus more than capable of

recognising the rhetorical strategy of litigants, not letting themselves be tricked and manipulated. Similarly, Athenian litigants were careful to avoid excessive reliance on emotional pleas since such an effort could backfire and damage their chances of success. Taking these into account, it may be suggested that modern researchers should be cautious when they underestimate the ability and desire of the Athenians to enforce their notion of the rule of law.

Notes

1 For the *logos − ergon* antithesis, see for example Aeschin. 1.179−81, 93; 2.5; 3.168, 174; Dem. 18.276; 55.2; Antiph. 2.2.2; 2.3.3; 5.84; 6.47; Andoc. 1.7; 3.1; Lys. 7.30; 12.33; 19.61; 25.13; 34.5.
2 Aeschin. 1.127.
3 Then, using a deductive way of reasoning, Aeschines could argue that an indecent man like Timarchus was highly likely to have prostituted himself. Cf. Aristotle's *Nic. Eth*. 1103b: 'our actions, as we have said, determine the quality of our dispositions'; 1114a: 'They acquire a particular quality by constantly acting in a particular way. This is shown by the way in which men train themselves for some contest or pursuit: they practice continually. Therefore only an utterly senseless person can fail to know that our characters are the result of our conduct.'
4 Lys. 14.42: οὕτω γὰρ διάκεινται, ὥστ' ἐπὶ μὲν τοῖς καλοῖς αἰσχύνεσθαι, ἐπὶ δὲ τοῖς κακοῖς φιλοτιμεῖσθαι.
5 Dem. 36.55; 52.26.
6 A similar argument is given by Harris (2007), regarding legal precedent, *pace* Lanni (2004). In our case, although the Athenians were inclined to admit evidence that modern courts would tend to dismiss as irrelevant (but evidently they did not as their practice suggests), they carefully designed their speeches in order to promote the most relevant and proximate. See for example the directly relevant argumentation in Dem. 18.125; 37.56; 44.38; 50.68; 54.3−7, 16; 57.59−60.
7 Cf. Dem. 36.55−6.
8 Lys. 19.13.
9 For a polemic against the Athenian legal system due to its manipulation by witty orators, see for example Isocrates' 7.33−4; Xen. *Apol*. 4; Dem. 23.206 etc.
10 In the previous chapters I have referred to relevant literature, for example Ober (1989), Cohen (1995), Christ (1998), Lanni (2006).
11 This is the ultimate goal of the parties in modern trials as well; cf. Kubicek (2006), Ch. 1.
12 For the extent of assistance that Athenian litigants received from their friends and supporting speakers, see Rubinstein (2000). The evidence for a law requiring that litigants ought to speak for themselves comes from Quintilian's, *Institutio Oratoria* (2.15.30) and is accepted by Bonner (1927); Goldhill (2002), 62; Kennedy (1998), p. 219.
13 For the *logographer* see Chapter 2. The differences between amateur and professional speech in the Athenian courts with the shortcomings of the first that the second tried to correct is the theme of Bers (2009). The extent of the logographer's assistance to an amateur client forms a continuum, ranging from 'the high end, a *logographos* composing and delivering a speech himself . . . to the extreme low end, a functional illiterate making an unrehearsed, truly spontaneous speech' as described in Bers (2009), p. 10; cf. Dover (1968), Ch. 8.
14 The most famous example is to be found in the face of Strepsiades in Aristophanes' Clouds.
15 Aristotle's *Rhetoric* being the most famous, without underestimating the influence of Plato (see for example Gorgias, Phaedrus) or the practical handbook of Anaxim. *Rhet. ad Alex*. Others have reached us through fragments or only by their names, though they

seemingly had substantial impact on their contemporaries, writers such as Thrasymachus, Prodicus, and Theopompus of Chios.

16 Although his lack of interest in (or even dislike of) forensic oratory hindered him from giving us a more accurate and detailed view of this genre [see Trevett (1996)]. Furthermore, his interest in discussing rhetoric as a discipline forming the counterpart of dialectic, led him sometimes to a more theoretical than practical approach. This is also why it is questionable whether the *Rhetoric* forms an accurate guide for the study of Athenian rhetoric in particular [see Hesk (2009); Harris (1994); Mirhady (1990); Carey (1996)].
17 Carey (1994), at pp. 35, 39, 44.
18 I borrow the term from Carey (1996).
19 Based on Arist. *Rhet*. 1354a, b; 1415b, this is the interpretation of, for example, Carey (1996), p. 40, n. 24; Trevett (1996), pp. 378–9.
20 Cf. Harris (1994).
21 Harris (1994), (2006) shows that such inconsistency is non-existent. No Athenian would consider rhetoric as inconsistent with legal argumentation, and no litigant would even think of inducing the jurors to disregard the law in favour of equity or other considerations.
22 See for example Rodgers (1984).
23 Gill (1984), p. 165; cf. p. 153.
24 Fortenbaugh W. (2006), Ch. 18, pp. 317ff.
25 This was the idea in Fortenbaugh (1992), where he sees the Arist. *Rhet.* 1.2 and 2.1 as complementary. Fortenbaugh (1996) prefers to see them as distinct, referring to different settings. The fact that Aristotle deals very briefly with persuasion through character as opposed to his account on emotions (2.2–2.11) is attributed to the familiarity of the audience with this kind of argumentation, since it held its roots in Homer. This lack of originality, as opposed to Aristotle's new, cognitive analysis of emotions, led him to restrict the length of the former and expand that of the latter.
26 Cf. Classen (1991).
27 Steel (2009), p. 81. As we have seen before, this may be accepted with some reservations. Cf. Rubinstein (2000).
28 Cf. Carey (1996), p. 40 n. 24.
29 Cf. Fortenbaugh (2006), p. 325.
30 Fortenbaugh (2006), p. 317.
31 This strategy was very risky as to its results, as will be shown in due course, especially when dealing with experienced audiences like the Athenians.
32 Gill (1984), pp. 165–6, and n. 99.
33 Cf. Arist. *Nic. Eth.* 1167a–b; cf. McGlew (2004).
34 Cf. Arist. *Rhet*. 1367b: 'We ought also to consider in whose presence we praise, for, as Socrates said, it is not difficult to praise Athenians among Athenians. We ought also to speak of what is esteemed among the particular audience, Scythians, Lacedaemonians, or philosophers, as actually existing there.'
35 Cf. Fortenbaugh (2006), p. 338.
36 Fortenbaugh (2006), p. 334 n. 44.
37 Arist. *Rhet*. 1378a19; *Nic. Eth.* 1166b33 where goodwill is described as 'less intense *philia*'; Fortenbaugh (1992), pp. 219–20.
38 For a study of such responses, see Bers (1985).
39 Harris (1994), p. 137.
40 Rubinstein (2004).
41 Bers (2009), p. 98.
42 For a study of 'rage' and the aforementioned transition see Harris W. (2001), esp. Chs 7, 8.
43 This is evident by their presence in the surviving speeches; see for e.g. Dem. 21.34; 24.118; Lys. 6.17; 31.11; Isoc. 18.4,36; 20.6, 9, 22 etc.

44 Dennis (2010), p. 12.
45 οὖν τοῦ ἤθους, ὅταν οὕτω λεχθῇ ὁ λόγος ὥστε ἀξιόπιστον ποιῆσαι τὸν λέγοντα: τοῖς γὰρ ἐπιεικέσι πιστεύομεν μᾶλλον καὶ θᾶττον, περὶ πάντων μὲν ἁπλῶς, ἐν οἷς δὲ τὸ ἀκριβὲς μὴ ἔστιν ἀλλὰ τὸ ἀμφιδοξεῖν, καὶ παντελῶς. δεῖ δὲ καὶ τοῦτο συμβαίνειν διὰ τοῦ λόγου, ἀλλὰ μὴ διὰ τοῦ προδεδοξάσθαι ποιόν τινα εἶναι τὸν λέγοντα: οὐ γάρ, ὥσπερ ἔνιοι τῶν τεχνολογούντων, οὐ τίθεμεν ἐν τῇ τέχνῃ καὶ τὴν ἐπιείκειαν τοῦ λέγοντος, ὡς οὐδὲν συμβαλλομένην πρὸς τὸ πιθανόν, ἀλλὰ σχεδὸν ὡς εἰπεῖν κυριωτάτην ἔχει πίστιν τὸ ἦθος.
46 Antiph. 6.18; cf. Lys. 22.17.
47 Antiph. 6.16.
48 Andoc. 1.133; cf. 1.139.
49 Lys. 26.21.
50 See for example Gill (1996), at pp. 22, 104, 179, 203 and 227; cf. Cairns (1993), at pp. 6−10.
51 For Chrysippus in particular, emotions depended on (or, more strongly, *were*) beliefs. See Gill (1996), p. 227.
52 Cf. Konstan (2000), p. 129.
53 See Johnstone (1999), p. 110.
54 Cf. Konstan (2000), p. 138: '[h]e is making vivid to the jury what losing his case would mean for himself and his family, precisely on the assumption that he is innocent. His object is not to ask for mercy, in the sense in which mercy presupposes guilt; it is to make sure that no irrelevant motive, such as personal hostility, political partisanship, or favour toward his accuser, may induce the jury to convict him, by making clear what is at stake if they do so.'
55 Cf. Johnstone (1999), at pp. 111−20.
56 See for example Rubinstein (2004) and (2005); Konstan (2008); Harris W. (2008), Ch. 8.
57 Arist. *Rhet*. 1380a.
58 See Rubinstein (2004), (2005).
59 Rubinstein (2004), p. 193.
60 Rubinstein (2004), p. 195.
61 See Konstan (2003); cf. Cairns (1993).
62 As Cairns (1993), p. 5 asserts: 'to experience shame is to place an action, experience, or state of affairs in the category of the shameful, the criteria of the shameful being supplied by subjective attitudes and cultural conditioning . . . an occurrence of fear, shame, anger, or *aidos* relates to some perceived attribute of the world "out there".'
63 See for example Dem. 21.109, 151, 201.
64 Dem. 22.47.
65 Dem. 18.121; cf. Dem. 37.52; Dem. 43.38.
66 See Chapter 4, the section on 'silence'.
67 Dem. 23.208; cf. 48.2.
68 See Spatharas (2011); Dyck (1985).
69 See for example Lys. 18.21.

References

BERS V. (1985), 'Dikastic Thorubos', in P.A. Cartledge and F.D. Harvey (eds), *Crux: Essays in Greek History Presented to G.E.M. de Ste. Croix*, London: Duckworth, 1−15.

——— (2009), *Genos Dikanikon: Amateur and Professional Speech in the Courtrooms of Classical Athens*, Harvard: Harvard University Press.

BONNER, R.J. (1927), *Lawyers and Litigants in Ancient Athens*, Chicago: University of Chicago Press.

CAIRNS D.L. (1993), *Aidōs: the Psychology and Ethics of Honour and Shame in Ancient Greek Literature*, Oxford: Clarendon.

CAREY C. (1994), 'Rhetorical Means of Persuasion', in I. Worthington (ed.), *Persuasion: Greek Rhetoric in Action*, London: Routledge, 26−45.
——— (1996), '*Nomos* in Attic Rhetoric and Oratory', *Journal of Hellenic Studies* cxvi, 33−46.
CHRIST M.R. (1998), *The Litigious Athenian*, Baltimore: Johns Hopkins University Press.
CLASSEN J.C. (1991), 'The Speeches in the Courts of Law: A Three-Cornered Dialogue', *Rhetorica*, Vol. IX, No. 3 (Summer 1991), 195−207.
COHEN D. (1995), *Law, Violence, and Community in Classical Athens*, Cambridge: Cambridge University Press.
DENNIS I.H. (2010), *The Law of Evidence* (fourth ed.), London: Sweet & Maxwell.
DOVER K.J. (1968), *Lysias and the Corpus Lysiacum*, Berkeley: University of California Press.
DYCK A.R. (1985), 'The Function and Persuasive Power of Demosthenes' Portrait of Aeschines in the Speech "On the Crown"', *Greece & Rome* 32.1, 42–8.
FORTENBAUGH W. (1992), 'Aristotle on Persuasion through Character', *Rhetorica*, Vol. 10, No. 3 (Summer 1992), 207−44.
——— (1996), 'Aristotle's Accounts of Persuasion through Character', in C. Johnstone (ed.), *Theory, Text and Context*, Albany: State University of New York Press, 147−68.
——— (2006), *Aristotle's Practical Side: On His Psychology, Ethics, Politics And Rhetoric* (Philosophia Antiqua), Leiden: Brill Academic Pub.
GILL C. (1984), 'The *Ethos/Pathos* Distinction in Rhetorical and Literary Criticism', *Classical Quarterly* 34 (i), 149−66.
——— (1996), *Personality in Greek Epic, Tragedy, and Philosophy: the Self in Dialogue*, Oxford: Clarendon Press.
GOLDHILL S. (2002), *The Invention of Prose*, Oxford: Oxford University Press/The Classical Association.
HARRIS E.M. (1994), 'Law and Oratory', in Ian Worthington (ed.), *Persuasion: Greek Rhetoric in Action*, London: Routledge, 130−50.
——— (2006), 'Solon and the Spirit of the Law in Archaic Athens', in E.M. Harris, *Democracy and the Rule of Law in Classical Athens: Essays on Law, Society, and Politics*, 3−28.
——— (2007) 'Did the Athenian Courts Attempt to Achieve Consistency? Oral Tradition and Written Records in the Athenian Administration of Justice', in C. Cooper (ed.), *Politics of Orality*, Leiden: Brill, 343−70.
HARRIS W. (2001), *Restraining Rage: The Ideology of Anger Control in Classical Antiquity*. Cambridge, MA: Harvard University Press.
HESK J. (2009), 'Types of Oratory', in E. Gunderson (ed.), *The Cambridge Companion to Ancient Rhetoric*, Cambridge: Cambridge University Press, 145−61.
JOHNSTONE S. (1999), *Disputes and Democracy: the consequences of litigation in ancient Athens*, Austin, TX: University of Texas Press.
KENNEDY G. (1998), *Comparative Rhetoric: An Historical and Cross-Cultural Introduction*, New York: Oxford University Press.
KONSTAN D. (2000), 'Pity and the Law in Greek Theory and Practice', *Dike*, 3, 125−45.
——— (2003), 'Shame in Ancient Greece', *Social Research*, Vol. 70, No. 4 (winter 2003), 1031−60.
——— (2008), 'Assuaging Rage: Remorse, Repentance, and Forgiveness in the Classical World', *Phoenix*, Vol. 62, 243−54.
KUBICEK T.L. (2006), *Adversarial Justice: America's Court System on Trial*, New York: Algora Publishing.

LANNI A. (2004), 'Arguing from "Precedent": Modern Perspectives on Athenian Practice', in E.M. Harris and L. Rubinstein (eds), *The Law and the Courts in Ancient Greece*, London: Duckworth, 159−71.

——— (2006), *Law and Justice in the Courts of Classical Athens*, Cambridge: Cambridge University Press.

McGLEW J.F. (2004), '"Speak on my Behalf": Persuasion and Purification in Aristophanes' Wasps', *Arethusa*, 37 (2004), 11−36.

MIRHADY D. (1990), 'Aristotle on the Rhetoric of Law', *Greek*, *Roman and Byzantine Studies* 31, 397.

OBER J. (1989), *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People*, Princeton, N.J., Princeton University Press.

RODGERS R.S. (1984), 'The Wasps in Court: Argument and Audience in the Athenian *Dicasteries*', *The American Journal of Legal History*, Vol. XXVIII, 147−63.

RUBINSTEIN L. (2000), *Litigation and Co-operation: The Use of Supporting Speakers in the Courts of Classical Athens*, Stuttgart: F. Steiner Verlag. Historia Einzelschriften; vol. 147.

——— (2004), 'Stirring up *Dicastic* Anger', in D.L. Cairns and R.A. Knox (eds), *Law, Rhetoric and Comedy in Classical Athens: Essays in Honour of Douglas M. MacDowell*, Swansea: Classical Press of Wales, 187−203.

——— (2005), 'Differentiated Rhetorical Strategies in the Athenian Courts', in M. Gagarin and D. Cohen (eds), *The Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press, 129−45.

SPATHARAS D. (2011), 'Self-Praise and Envy: From Rhetoric to the Athenian Courts', *Arethusa*, Volume 44, Number 2, Spring 2011, 199−219.

STEEL C. (2009), 'Divisions of Speech', in E. Gunderson (ed.), *The Cambridge Companion to Ancient Rhetoric*, Cambridge: Cambridge University Press, 77−91.

TREVETT J.C. (1996), 'Aristotle's Knowledge of Athenian Oratory', *The Classical Quarterly*, New Series, Vol. 46, No. 2 (1996), 371−9.

Conclusions

Analysis of character evidence, a dominant aspect of Athenian forensic argumentation, is central to the better understanding of the nature of Athenian law and its placement within its appropriate socio-political and cultural boundaries. In the first instance, the issues discussed touch upon the Athenian approach to law and justice; the question of relevance predominates. Closer inspection shows that the material used in this study radiates to most fields of human life.

This book aspired to be deeply 'political' in the Aristotelian sense of the word. The flaws of historical materialism, as disguised in the form of Western Capitalism or Marxism, have repeatedly been exposed and the homo economicus has emerged following a deeply antisocial, utilitarian stance. The Western worldview with its deification of the consumerist market economy has led to an egocentric, individualistic barbarism. The Greek worldview poses an alternative. Their ideas may form the foundations of social and historical progress. Resistance to voracious selfishness need not take the form of an alternative ideology which accepts the same patterns of thought but interprets them differently. The emergence of an alternative lifestyle directed by the *tropoi* of the participatory, communal homo politicus may be brought forward as the way ahead. Therefore, this study aimed at familiarising its reader with an alternative worldview, by taking a step away from the materialistic conception of being and placing the political human at the forefront.

As has been demonstrated, the legal structures of the ancient polis in particular, retained their original political character of serving the needs of the citizens. Abstaining from taking an elitist, cut off from society, autonomous path, justice remained a matter for the community. Direct and unimpeded partaking in the civic workings gave meaning to the 'objective-participant' person's life. The field of the courts was run by laymen whose deeply rooted traditional conceptions guaranteed a coherent and consistent approach to justice in the form they moulded it.

Key findings

This study demonstrated the consistent presence of character evidence as an integral part of rhetoric during the archaic and the classical period. Alongside examples from the earliest period, proof was offered that this approach to forensic argumentation, typical of the fifth century, was inherited from the practices of the

past (Chapter 1). This conclusion allows the observation that the Athenian legal system has to be viewed as a single living organism which changed and evolved through the centuries. Furthermore, evidence drawn from throughout the Greek world, supported the inner uniformity of Greek law as an entity, regardless of the superficial differentiations of the laws of each polis.

In both legal and quasi-legal fields, broad citation of argumentation drawn from the speaker's *ethos* allegedly challenges the rule of relevance that required adversaries to 'speak to the point'. However, the persistence of this practice and the consistent patterns of argumentation which were (intuitively or consciously) followed by the speakers, accepted by the audience, and permitted by the structures, suggest a different story. If these were leading to confusion and dispute, the Athenians would have developed stricter controlling mechanisms. The incentives offered by the legal system itself (Chapter 2) prove the opposite. The implication of this study is that the rule of relevance was substantively respected, in accordance with the standards the ancient Athenians had set. These standards had to be uncontroversial and objective, rather than ambiguous. If the underlying causes of this practice were solid, the first step towards consistency of approach through time and space would have been taken.

The wide invocation of character evidence has its roots in psychological factors and may safely be partly attributed to Greek ideas of 'character' (Chapter 3). Both philosophical and popular confidence in the probative value of character allowed and caused its wide use in forensic argumentation. In an era when proof beyond doubt was not facilitated by technological means, other forms of evidence gained ground. Of these alternative forms, character was the most trustworthy. Belief in the unity of virtue or vice induced litigants to highlight their good traits and their opponent's reprehensible ones, even though (at first glance) they may seem only remotely relevant. Uncertain conclusions about human character caused the flexible approach of the orators and explain the varying theories expressed in the speeches. For example, uncertainty as to the changeable nature of a person's character led to the citation of a series of examples from the past, in order to prove consistency of behaviour. Nonetheless, responsibility for a person's actions was not questioned (regardless of whether other forces such as chance or accidental ignorance came into play) with attribution of guilt and blameworthiness remaining unproblematic.

The conclusions of Chapter 3 as to the first underlying cause of the wide approach to argumentation from *ethos* reveal the rationale behind the strategies and methods the Athenians used to portray character. These have been explored, while illustrating the patterns the orators followed. As a result, these patterns made forensic argumentation relatively consistent and predictable. Its content though, was directly linked to deeper issues of Athenian life. Sociological and cultural considerations have to be taken into account in order to understand the rhetorical tactics of ancient orators. The importance of living in a face-to-face community leaves its mark on the strategies of providing character evidence. In the context of a 'shame-culture', reputation and gossip carry significant weight, disproportionate to what they are afforded in modern courts. Comparison with the Anglo-American approach is necessary in order to highlight the cultural forces influencing the semi-autonomous

realm of the courts. To complete the picture, technical issues have also been discussed, mainly concerning the presentation and delivery of the speeches.

These two Chapters (3 and 4) examined the Greek ideas of 'character' and illustrated how they worked in practice. Another driving force, the Greek ideas of 'personality', decisively influenced forensic argumentation and caused the wide use of character evidence (Chapter 5). Modern ideas of personality are completely unsuitable for application in the setting of classical Athens and could be misleading. In order to comprehend and explain the Athenian approach to justice, the Cartesian and Kantian models of the 'subjective-individual' person have to be replaced by the ancient 'objective-participant' self. This methodological issue constitutes the key for a more accurate and proper interpretation of Attic rhetoric. The Athenian legal system's procedures and practices can only be evaluated in accordance with their standards. When contrasted to modern approaches, clarification of the terms and standards through which this comparison is made is necessary. Any references to controversial notions such as the rule of law or relevance and any evaluations as to whether the Athenians actually attained them are invalid unless clear definitions of these terms are given. Judging the ancient Athenians according to whether they had actually attained anything similar to the modern 'rule of law' is anachronistic.

Deep understanding and application of the ancient model of the human mind and action theory (instead of their Cartesian and post-Cartesian counterparts) exposed the Greek method of reasoning. In addition, the application of the ancient theory of ethical motivation illustrated that the many instances of litigants' invocation of their wholehearted adherence to the norms of the community, were not simply rhetorical devices to win the goodwill of the jury but had deeper causes and implications. Keeping in mind the unity of virtue and vice and the indivisibility of character (discussed in Chapter 3), obedience to communal rules proved the person's affiliation to the polis and the community as a whole. As a result, in the light of the conventional morality, a person who had demonstrated proper / improper ethical motivation was deemed to be capable / incapable of committing a crime. Understood in such terms, character evidence becomes surprisingly relevant.

The final Chapter once again limited its focus to the legal system (like Chapter 4). Based on a close examination of the forensic speeches, it exposed the more practical and legalistic purposes of character evidence in the courts. The conclusion is that, regardless of the fact that many researchers interpret character evidence as a means of distracting the jurors' rational thinking by arousing their emotions, the susceptibility of Athenian courts to irrelevant argumentation remained minimal and rarely obstructed the smooth execution of justice. The rule of law (as the Athenians understood it) prevailed and, among other factors, credit has to be given to the wide use of character evidence.

Further implications

The study of character evidence in the legal sphere touches upon further issues of everyday life. The sphere of the courts is not autonomous from other fields of social and political life; this is particularly true in the case of classical Athens. The

Athenian 'objective-participant' person lacked the modern 'autonomy of the will in every single instant of his life'. Also, there was an overlap of personnel between the public bodies as these were manned by the same people. Litigants carried with them in the courtroom their personal merit, record of past acts, and characteristic ethical motivation.

This reality of the Athenian legal system may be extended to other fields such as the theatre and political rhetoric. A comparative study may put together the evidence from political speeches and theatrical plays in order to discover similarities and differences as to their respective approaches to character and personality. This may disclose the extent of homogeneity between the argumentation displayed in a theatrical *agon*, in a fierce political contest and in the adversarial arena of a court. In this way, constants of a popular culture will emerge and the extent of diffusion of philosophical ideas to the popular masses will be revealed. Although this influence is bidirectional, a solid argument will be offered to those that see arenas such as the theatre and the Pnyx as educators of the public.

What is certain is that the argumentation offered in the courts differed from the theatrical *agon* in a very important aspect. While litigants displayed 'first-order' ethical reasoning, showing their complete adherence to the undisputed conventional ethics of the community, theatrical characters proceeded to 'second-order' reasoning, examining and questioning these norms. The reasons for this approach are many and, to an extent, obvious. First, the role of theatre differs from that of the court. Regardless of whether a poet longed for the prize, theatrical characters enjoy a certain freedom, while litigants risk their life and property in reality. Thus for the latter it is of utmost importance to win the goodwill of the jurors by showing their unequivocal submission to the rules of the community. At the end of the day, the one and only norm to be judged in the court is the written law that the defendant has allegedly breached. This alone is enough to forbid any 'second-order' reasoning that challenges the law of the polis; no one dared to question it or to provoke jurors to vote on other issues. This is yet another indication of the prevalence of the rule of law in Athenian courts. The only court speech that seems to display 'second-order' reasoning, criticising the practices of Athenian courts and the systematic attitudes of litigants and jurors is Plato's *Apology of Socrates*. This may also form the focus of further research and analysis on the above grounds.

This study also relied on the understanding and application of the Greek method of reasoning. It has been argued that the strategies and the content of character evidence have been formed in accordance with the inductive mode of thinking. Either in a conscious or an unconscious way, the influence it has exerted on argumentation is indisputable. Nevertheless, the type of argumentation in turn influenced the functions of the legal system and the nature of Athenian law. The obvious question that logically follows is that: 'If the inductive mode of reasoning influenced and formed to an extent the Athenian legal system, did it have similar consequences for other institutions as well?' Maybe the question seems far-fetched and overambitious, but what is the relationship of a population's typical method of reasoning to formations such as the polis-state, to constitutions such as the democratic, or to religious types such as polytheism? Building on the methodology of Plato in

the *Republic*, does the human psyche resemble the institutions humans create? Is there a link between Greek ideas of 'character', 'personality' and the political and social structures they formed? Such questions, which fall outside the sphere of the present study, may nonetheless be equally fruitful if followed up.

Insisting on the realm of reasoning, light should be shed on the 'Greeks and the Rational', as dictated by the findings of Chapter 5. There, it has been proved that the ordinary Athenian, sitting in the popular arena of the courts, judged human action and motivation in perfectly rational terms. Litigants and jurors alike insisted on proofs based on logical argumentation in which the aims, motives and past acts formed the parts of an almost mathematical equation. Human action was thus judged in nearly objective terms. The striking fact is that this argumentation was offered to a large audience of average, sometimes illiterate, citizens. Farmers, merchants and hand-workers over the age of thirty interpreted human action (possibly intuitively) with the use of all available means in order to achieve the desired end, which in turn illuminated the particular facts of the case. It seems that this audience was particularly experienced in such matters and since it formed the core audience of every public institution of classical Athens it may safely be concluded that it was one of the highest-quality popular audiences of recorded history. Therefore, further research may be undertaken on similar grounds regarding the factors and the rationale that directed decision making in other popular bodies as well.

Leaving aside the implications of this study for Athenian socio-political life, I want to highlight its major implications for its legal system. It has been demonstrated that character evidence may be seen as a remnant of the archaic age. This provides a link of the classical legal system with its archaic counterpart, supporting the view that it should be regarded as a single organism that evolved and changed through time. This approach may assist in shedding light on the poorly recorded archaic system, by discovering its similarities with the better recorded classical one. Procedures, institutions and practices of the classical system may have already been present in older times, though in an embryonic state. Transformations may have concealed the common core of two practices. To give but an example, the reward to the judge with the better judgment of archaic times (prize) may have given way to the democratic jurors' pay (a law initiated by Pericles himself). In this symbolic way, every Athenian citizen (rather than a single elder judge) was considered capable of giving straight judgment and the polis was certain that he would do so. This does not mean that no alterations or innovations took place; it simply means that research has to take a holistic approach regarding the Athenian legal system in order to uncover the causes and rationale behind its major changes.

Focus on the classical legal system reveals even more opportunities for further research. Researchers so far have been convinced that argumentation and decision making in the popular courts differed from the stricter approach taken by the Areopagus (and the Maritime cases as well). However, the exactness of argumentation in the popular courts and the fact that there are no significant differentiations between argumentation in the various court settings call for investigation. Relevance may thus be reconsidered, as well as the Athenian (and modern) certainty about the expertise of the Areopagus. This does not diminish this respected

court's value; it rather appreciates the efficacy and worth of the popular courts. Hand in hand with this approach goes the capability of Athenian courts to achieve consistency. Although this topic has already been researched, this book may assist by focusing on the litigants' patterns of argumentation and the jurors' way of decision making. It has been demonstrated that both followed a consistent, rational and nearly objective approach, and this strengthens the arguments of those who maintain that the Athenian courts were able to achieve consistency.

Finally, attention should be given to methods of punishment which may illuminate their originator's ideas of character. Although these methods may be inspired by other considerations as well, they undoubtedly reveal a great amount about the psychological convictions and the priorities of a people. For instance, acceptance of the possibility of rehabilitation produces milder, less final sentences and indicates a trust in character's changeable nature. On the other hand, severe penalties may highlight the society's assumption that a criminal does not change. In more practical terms, it may express the state's need for deterrence due to its weak proactive mechanisms and its commitment to public peace and security rather than to the individual. This is indeed a fertile ground for further research.

This book has explored a series of issues, touching upon several fields of social sciences. It is certainly challenging to follow an interdisciplinary approach. Combining evidence from law and history, sociology and social anthropology, politics and psychology is demanding but worthwhile. This is definitely not the end of the story; no one (including myself) would have been satisfied if it was, so the above examples indicate possible ways for advancement. What is more fascinating and valuable after all is for this study to become a stimulus and a stepping stone for fruitful and honest dealing with the Greeks and their underrated system of law. Hopefully, the various influences that gathered their forces to produce this result, will offer as many inspirations for the advancement of research and for the good of humanity.

Index

accountability: judges 31; magistrates 69; public officials 69
acephalous societies 46n23
action: ethical autonomy of 10
action-theory 169–70, 175, 223
ad hominem argumentation 23, 24–5, 63, 84, 85, 205
adjudication 2, 3, 21, 36, 63; and amateurism 57; 'impersonal' mode of 56; participation in 55, 61
adoptions 73, 79
adversarial system 12, 13, 31, 38, 63–4
Aeschines 23; *Against Ktesiphon* 125; *Against Timarchus* 72, 79–80, 85, 122, 141–2, 147, 148, 152, 153, 156, 204; contest with Demosthenes 86–7, 123, 125, 182, 187; on past acts 205; on relevance of arguments 82; on scrutiny for public office 72; on use of poetry 155–6; on voice 151–2
Aeschylus: *Eumenides* 35–40; on character 119; on *ethos* 104
age 34–5, 122, 135n102, 157, 188, 199n125–8
aggressiveness 188
agon 224
agones timetoi 129, 189; *see also timesis*
agora 21; and judicial process 31
agreements, breach of 78
akrasia 117–18
Alcibiades the Younger 67
aliens (metics) 76, 188, 199n20; *see also* naturalisation
amateurism 11, 22, 31; and adjudication 57; evading 61–3; ideology of 56–63
anakrisis 38, 51n96, 59
Anaximenes of Lampsacus 207
ancestral constitution 47n43
Andokides 120, 122, 182, 211
anger 127–8, 135–6n103; appeals to 213; *see also* rage
antidosis 173
Antiphon 26, 83, 86, 127, 186, 211; First Tetralogy 171–3
antisocial behaviour 131, 141, 181–2
apagoge 42
apographe 144, 174
Apollodorus 58, 144, 174, 188, 210
aporia 113
appeals: to anger 213; to pity 2, 150, 212–13; *see also* emotional appeals
appearance 152, 163n78, 198n115
arbitrariness 31
arbitration: as a form of dispute-settlement 21, 22; in Aeschylus's *Eumenides* 36–7; in Homer 27; in Homeric Hymn to Hermes 34; in the poems of Hesiod 32; voluntary 32, 34–7
archaic remnants 42–3
archaic trials 21–45; and *dikai* 44; role of bystanders 31, 41–2
archives 42–3
Areopagus 44; as the most scrupulous tribunal 68; establishment of 35–6, 44; rules governing forensic argumentation 68–9
arete 107, 109, 111, 118, 133n45, 152; *see also* virtue
argumentation: *ad hominem* 23–5, 63, 84, 85, 205; approach to 5, 10; based on ambiguous norms 26; based on public interest 38, 75–6; consistency 7, 88, 152; emotional 5–6, 208, 210; in Aeshylus's *Eumenides* 37–8; instinctive 21; *see also* extra-legal argumentation; rhetoric
arguments: from precedent 39; from private life 69; from probability 34, 44, 64, 73, 79

Aristophanes 81
Aristotle: *Nicomachean Ethics* 151, 152, 215; on anger 213; on arbitration 81; on character 115–18; on credibility 211; on delivery 149; on emotional argumentation 208–9; on envy 214; on establishment of concord 38; on *ethos* 104; on evidence 63; on forensic speech 63; on indivisibility of character 124; on personal characteristics 66–7; on 'personal justice' 31; on precedent 39; on relevance of arguments 82; on speaking outside the issue 44; on the ballot of the courts 55; on types of rhetoric 28; on use of poetry 155; on virtues 115–16; *Poetics* 115; 'practical syllogism' 170, 171; *Rhetoric* 115, 152, 206–8, 211
artful proofs 206
artless proofs 206
associates 146–9
Athenian legal system: archaic remnants in 42–3, 128; comparison to modern 11–12, 17n19; democratic nature 55–6; flexibility of 65–7; penal system 128–9; *see also* courts
atimia 80, 128, 129, 185
Attic orators 13, 26, 32, 37–9, 81
Attica 22
audience: disapproval of 58; impartiality of 208, 210; securing good will of 206, 209; *see also* spectators
authority: judicial 29; public 2, 51n96; religious 29; *see also* authority figure
authority figure 185, 198n105
autonomy: moral 178, 185; of courts 67–9; of will 178
axiopistia 207, 211; *see also* credibility; trustworthiness

background information 5
behaviour: antisocial 131, 141, 181–2; consistency of 120, 222; criminal 102, 142; hubristic 121, 174, 181; in modern psychology 102–3; past 16, 72, 74, 77, 102, 119; political 76; public 89, 197n84, 204; setting standards of 9; social 89
beliefs 113, 169, 170, 172; and emotions 208, 212; ethical 5, 9, 89, 179–81, 185, 212; internalisation of 185
bravery 188
bribery 183
burden of proof 59–61, 90n23
bystanders 31, 41–2

capacity 56, 103
Cartesian model of the mind 169, 170, 177
character 130–1; and age 122; and education 105, 113; and ethical autonomy 10; and punishment 128–9; as innate 119–22; changeability 122–3; comparison 154; conceptions of 11–12; definitions of 18n39, 101; disposition of 116; Greek ideas of 8–10, 22, 65, 99–131, 222; imposed 110; in modernity 101–3; in rhetoric 205–12; in strict law 204–5; indirect portrayal 148; indivisibility of 123–6; natural 110, 120; nature and nurture debate 99–100, 104; orators on 28, 118–28; *see also* character evidence; character traits; *ethos*
character evidence: concept of 101–2; purpose of 210–12; *see also* character
character traits: classification of 141; responsibility for 116; *see also* character
citation of laws 154–5
citizen list 71
citizen rights 76; *see also atimia*
citizenship: acquisition 72; grants of 76; idea of 71; *see also* naturalisation
civic behaviour 187
civic virtues 209
class tensions 189
Cleisthenes 42
codification: of legal rules 23, 43; of oral rules 21, 43
common good will 210
common interest 156, 177
common law 85, 102, 146
common sense 44
communal norms: adherence to 56, 64, 69, 179, 182
comparison 153–4
competence: of jurors 6, 13; of laymen 12
complaints 8
conceptualisation 170
conduct 9, 140, 148, 163n78; bad 14, 146; good 72
confiscation 129
consistency: in courts 45, 84, 158, 226; of argumentation 7, 88, 152; of behaviour 120, 222; of legal system 23, 88; of verdicts 4, 6–9, 89
contractual obligations 78
contrast 153–4

Corax 107
corona 41, 58
corruption 141, 183, 195n70; countering 69
cosmos 107
Council, the 69–71
courts: as discoverers of truth 5, 17n24, 193n14; as moral educators 9, 186, 198n106, 215; autonomy of 67–9; ballot of 55; character and emotions in 212–15; consistency in 4, 6–9, 89; impartial 37; mass jury 22, 23 popular 6, 17n18, 57, 68, 225–6; semi-autonomous sphere 69; *see also* court speeches; court verdicts
court speeches 2, 3; features of 4; *see also* forensic speeches
court system 35
court verdicts: adverse 5, 38, 176; and public opinion 31; consistency and predictability 6–7, 9; divergent interpretations 58; impact of 176–7; in *diadikasia* 73; validation of 44
cowardice 154, 184, 188, 196n8
credibility 22, 60, 64, 84, 190, 211; of speakers 57, 203
crime investigation 64–5
criminal behaviour 102, 142
Criminal Justice Act 2003 86, 140, 163n78
criminal law 56
crisis periods 70–1
cultural presumptions 212

Damages 78; *see also dike blabes*
death sentence 128
deceased persons 149
deceitfulness 143
decision-making 117
defamation 74
Deinarchos 81
Deiokes 41–2
delivery (*hypokrisis*) 149–53; and voice 150
democracy: and professionalism 56; and written laws 43
Demosthenes 23; accusations against 80; *Against Aristogeiton 2* 123; *Against Conon* 77, 174–5; *Against Meidias* 120–1, 153, 154; contest with Aeschines 86–7, 123, 182, 187; on *dike aikeias* 77–8; on *dike blabes* 78–9; on ethical motivation 181–3; on flexibility of the legal system 65–6; on *graphe hubreos* 74–5, 77; on human motivation 174–6; on idea of public interest 76; on irrelevant statements 85–7; on jurors' judgment 70; on menial calling 187; on natural honesty 119–20; on personal actions 126, 127; on unchangeable nature 123; on voice 151–2
desires 169, 170, 172
destiny 1
deterrence 36, 37, 129, 226; draconian penalties as 128; human laws as 109
diadikasia 71–3
digressions 6
dikai 44, 70–1; and rule of relevance 70; examples of 77–9
dikastai 31
dike aikeas 77–8, 144, 174
dike blabes 77–9, 175
dike epitropes 143
dike pseudomarturion 144–5, 175
Dionysius of Halicarnassus 23, 28
disputes: inheritance 73, 79, 145; personal 33; *see also* dispute settlement
dispute settlement 9, 31; in Aeschylus's *Eumenides* 36, 40; in early Greek literature 31; in Homeric Hymn to Hermes 33–5; in the poems of Hesiod 32–3; procedures 21
divine, the 1
documents: authenticity 79
dokimasia 71–3, 174
dokimasia rhetoron 79, 141
draconian penalties 128
Draco's laws 42
dress 140, 163–4n78
drunkenness 127–8, 135n101

economy: ethical 10; and character 105, 113; and virtue 109–10, 113–14; Plato on 113–14
egalitarianism 11
eisangelia 174
elite cohesion 189
elitist approach 13
emotional appeals 6, 23–5, 207, 208, 209, 210, 215; *see also* emotional argumentation
emotional argumentation 5–6, 208, 210; *see also* emotional appeals
emotional responses 5, 213, 215
emotions: and beliefs 208, 212; and reasoning 212; appeals to 6, 23–5, 207, 210, 215; as rational processes

10; cognitive dimension of 212; *see also* emotional appeals; emotional argumentation
English jurisprudence 60
English legal system 102, 103
enkrateia 117, 118
ennomos 181
envy 214–15
Ephialtes 35
epidikasia 51n96
epieikeia 5, 17n25, 207
equality 55, 68
equity 2, 5, 36
Erathostenes 87, 149
ethical autonomy 10
ethical beliefs 5, 9, 89, 179–81, 185, 212
ethical judgements 179
ethical knowledge 178
ethical life 178
ethical motivation 6, 177–88, 207; and social role 178, 187–8, 198n113; Kantian model 177–8
ethical norms: adherence to 5, 179, 180–2, 185, 187; and human nature 108; as action-guiding principles 186; enforced by law 7; in general character trait 8; internalisation 179, 180, 213; reinforcement of 9; validity of 185
ethical outcasts 186–7
ethical thinking 178
ethical values 178
ethos 99–100, 103, 105–7, 115–18, 210; amendment 114; Aristotle on 207–8; positive portrayal of 22; stability of 9; *see also* character
eunoia 209, 210; *see also* good will
Euphiletus 149, 184
Euripides 106, 148, 155, 156
euthunai 69
evidence: admissibility of 13; approach to 139–41; Aristotle on 63; collection 64; from the past 141–6; prejudicial 85; rules of admissibility 140
excellence 184
exile 128
experts 31, 56
extra-legal argumentation 2–4, 8, 16n8, 60–1; and *timesis* 81–2; archaic origins 22
extra-legal norms 88–9, 196–7n84

'face-to-face' society 31
fact-finding 13
false impression 85–6, 121, 140, 163n78
false prosecution 173–6
false witnessing 57, 144–5, 148
familiarity 22, 31
farmers 187
fate 1
Federal Rules of Evidence 147
Feud 36, 63
fight theory 12–13
fines 129
fixed crimes 45n5
fixed penalties 45n5
forensic speeches: adversarial nature 63; delivery in court 13–14; model of human motivation 171–6; *see also* court speeches
free will 126
freedom of choice 117, 124

good will: common 210; of audience 206, 209; of jurors 38, 39, 64; of the speaker 209–10; towards audience 208; towards *polis* 209; towards speakers 210
graphai 70–1, 74–7
graphe hubreos 66, 74, 77; Demosthenes on 74–5, 77
graphe paranomon 74–6, 183; adverse judgement in 75
gratitude 189; references to 39
guilt 179, 204; admission of 213
'guilt-cultures' 179–80

habitual virtues 116
hamartia 117
hand-workers 187
harm 78
Heliastic oath 2, 86, 177, 210
Heraclitus 1
hereditary punishment 132n30
Herodotus 41
heroism 184, 211
Hesiod: on *ethos* 104; rhetoric in the poems 32–3; *Works and Days* 104
Homer: on *ad hominem* argumentation 24–5; on appeals to emotions in 23–4; on arbitration 27; on origins of character evidence 23–31; on reconciliation in 27
Homeric Hymn to Hermes 33–5
homicide: accidental 26; distinguished from an act of violence 40; intentional 36, 149; laws 42; public procedure for 50n89; trials 39, 83
honorary decrees 76
hubris 66, 74, 75, 181–2; 188
hubristic behaviour 121, 174, 181

human action 6; and logical reasoning 170; interpretation in 'objective' terms 169–77, 225; 'subjective' view of 177–88
human agency 103
human breeding 112
human justice 109
human laws 109
human nature 1, 107; altering 109–10
Hyperides 58, 71, 143
hypokrisis see delivery

'ideal lawgiver' 185, 198n105
ignorance 135n101, 222
impartiality: of audience 208, 210; of court 37
impiety 173
imprisonment 129
indecency 80, 141, 181–2
individual choice 113
informal norms 88, 89
inheritance disputes 73, 79, 145
innuendoes 33, 141
instinctive argumentation 21
insults 136n103, 141, 181
intelligence 112
intentionality 117
interactionism 103, 105, 117
internalisation: of beliefs 185; of ethical norms 179, 180, 213; of social norms 181
invocation of liturgies 188–92
irrelevant statements 2, 82–8; rule of relevance
Isaeus 79
Isocrates 77, 151, 208, 210

judges: accountability 31; discretion of 7, 177; familiarity with litigants 31
judicial authority 29
jurors: choice of 36; competence of 6, 13; gaining good will of 38, 39, 64; impact of verdict 176–7; incentives for 189; judgment of 70; selection of 55, 61
jury service 61–2; unprofessional nature 6
justice: elitist approach 13

Kantian model of ethical motivation 177–8
knowledge: and virtues 115–16; as recollection 112–13

law: and politics 2; as common property 44; enforcement of 2; substantive orientation 9; *see also* rule of law
legal laissez-faire 12, 18–19n44
legal procedures: and use of character evidence 69–73; classification 69
legal rules, rationalisation and codification 23, 43
legal statutes: open nature 69, 73; wording of 73
legal terminology 73–4
Leocrates 142–3
lexis 153–5
literature 114
liturgies 188–92, 214
logographers 11, 62, 150, 206, 211, 216n13, 206, 216n13
logoi 153–5
love 127–8
Lycurgus 142–3, 156, 158, 174
Lysias 23, 28, 59, 122; on calculation of risk and benefit 67; on criminal nature 119–20; on disregard for communal norms 182; on *dokimasia* for public office 72.; on ethical motivation 188; on evidence from the past 121, 143; on human motivation 173–4; on indivisibility of character 126; on irrelevant evidence 83, 84, 85, 86; on litigant's appearance 152; on personal actions 127; on public cases 70; on references to litigant's associates 148–9; on reformation of character 123; on silence as character evidence 157; on use of witnesses 148; speech against Eratosthenes 87–8

magistrates 31, 55; accountability 69
magnanimity 10, 190
majority: vote 31; rule of 2, 55
maladministration 78
mass jury: courts 22, 23; legitimacy of 37
matricide 39
maturity 122
Meidias 66, 75, 121, 127–8, 181, 195n58
memories 169
merchants 187
Metroon 6, 43
military service 184
mind: ancient ideas of 169, 223; Cartesian model of 169, 170, 177; collective 168
misos 213
moderation 114
modernity 103
modern psychology 102
moral autonomy 178, 185
moral life 178

moral response 178
moral virtue 108, 207
motivation 168, 169; model of 171–6; *see also* ethical motivation
music 114
myth of Pandora 104

name calling 11, 27, 46n17
natural character 110, 120
natural honesty 119–20
naturalisation 76, 188, 192
natural justice 109
natural necessity 108
nature 1; and human laws 109; *see also* nature and nurture debate
nature and nurture debate 99–100, 104
Neaera 76, 154
need 126–7
neutral character testimony 140
Nicomachus 86
nomos 51n95, 100, 107–10

oaths 37, 44, 59; Heliastic 2, 86
'objective-participant' model of the self 65, 89, 188–92, 212
occupation 39
oikesis 185
oikos 10, 149, 176, 180, 184, 192, 213
'open texture' 73, 94n90
opposites 28
oral resources 7
oral rules 22; codification of 21, 43
orators: Attic 13, 26, 32, 37–9, 81; judging quality of 28; on character 28, 118–28; scrutiny of 72; *see also* speakers

paideia 209
pain 213
paragraphe 59–60
parents: maltreatment of 185; violence against 182
partisan witnesses 31, 57
past acts 140; as evidence 141–6; relevance 205; use for comparison 154; *see also* past behaviour
past behaviour 16, 72, 74, 77, 102, 119; *see also* past acts
pathos 5, 117, 210; Aristotle on 207–8; as 'rational' 212; persuasion through 208
patrios politeia 47
patriotism 2, 151, 196n84
pecuniary penalties 129
penalties: compromise on 81; draconian 128; fixed 45n5; pecuniary 129
perjury 176
personal actions, degree of probative value 126–8
personal disputes 33
personality 10, 56–7; and social role 158; approaches to 11; Greek conceptions of 8, 18n37, 22, 65, 168–9
personal justice 2, 22, 31
personhood 11–12, 18n39, 65, 158
persuasion: of public opinion 22–3; through pathos 208; tripartite 207, 209; *see also* persuasiveness; persuasive speech
persuasiveness 209; *see also* persuasion
persuasive speech 22–5
philia 181; respecting norms of 184–5; towards *polis* 209
Philocleon 6
philopolis 184, 190, 195n61
phusis 99–100, 104, 107, 108
physical characteristics 152
physical disability 153
physical education 114
Pindar 40, 104–5
pity: appeals to 2, 150, 212–13
Plato: *Apology* 81, 82, 224; Chariot myth 111, 112; Foundation myth 111–12; *Laws* 70; on character 110–15; on education 113–14; on recollection of the Forms 112–14; on soul 114–15; on truth 113; *Phaedrus* 111–12; *Protagoras* 107–8; *Republic* 108, 113; types of trials 70
Plutarch 59
poetry 155–7
polis: adherence to the norms of 182–4; ethical norm of 9; good will towards 209; *philia* towards 209; socio-political structures 10
political behaviour 76
'political correctness' 38
political rights, 69, 72
political virtues 110
politics: and law 2
popular courts 6, 17n18, 57, 68, 225–6
popular trials 11
poverty 126
practical reasoning 6, 118, 169–77, 190, 203
practical syllogism 170, 171
precedent: arguments from 39–40; forms of 39; targeted use of 6, 7
pre-judicial adjudication 21
pre-judicial evidence, 85

pre-judicial society 35, 36
presentation 149–53
Presocratics 107
prima facie case 60
private cases 55, 57, 62, 70, 92–3n66; *see also dikai*
private life, arguments from 69
private property 125
private suits 44, 55, 56; rule of relevance 83; *see also dikai*
probability: arguments from 34, 44, 64, 73, 79
professionalism 56
proofs 206
propensity 204–5
property damage 78
prosecution: false, 173–6; procedures 65
prostitution 125, 141, 153
prothumos 181
proto-judicial justice 36
psychology 5, modern 102, Greek 169
public authority 28
public behaviour 89, 197n84, 204
public cases 55, 62, 70, 92–3n66, 121, 213; *see also graphai*
public forums 31; *see also* agora
public interest: argumentation based on 38, 75–6
public office: suitability for 71–2
public officials: accountability 69; annual rotation 56, 72
public opinion 21–3; and verdicts 31; as legitimising force 41; conformity with 32–3; in support of self-help 46n23
public oratory 28; *see also* orators
public policy 176
public services 189
punishment 89; and character 128–9; as deterrent 109; avoidance of 37; hereditary 132n30; methods of 128–9, 226
Pythagoras 151, 157, 162n66

quasi-legal sphere 22

rage 213
ratio decidendi 6, 38, 60, 67
rationalisation of legal rules 23
rationality 170
reasoning:and emotions 212; and human action 170; first-order 185, 224; impact of verdict 176–7; means-end 170–3, 175, 190, 191; practical 6, 118, 169–77, 190, 203; rule-case 170–3, 175, 190, 191; second-order 185, 224; way of 5, 8
'reason–passion' contrast 212
reciprocity 184, 189
reconciliation: in Homer 27; in Homeric Hymn to Hermes 35; in Aeshylus's *Eumenides* 37
rehabilitation 128, 129, 226
relevance: notion of 2, 4; *see also* rule of relevance
religious authority 28
remorse 213
repentance 213
reprobation 109
reputation 140, 146–9
responsibility: as founded in capacity 103; conceptions of 56
restitution 128
retribution 36, 128
rhetoric: character in 205–12; concept of 45n6; development of 10, 23; in Aeshylus's *Eumenides* 37–40; in Homer 23; in the poems of Hesiod 32–3; rules of 30; types 28
risk, calculating 65, 67
rule of law: and popular courts 17n18; application of 4–6, 17n18; Areopagus representing 36; commitment to 2, 3; Greek ideas of 12, 17n18
rule of relevance 2, 3, 7–9, 11, 12, 44, 57, 58, 82–8; and *dikai* 70; formalisation of 83; *see also* 'speaking to the point'

schooling 114
self, the, 'objective-participant' model of 65, 89, 179, 188–92, 212
self-control 114, 136n103; and voice 152; and youth 188
self-criticism 179
self-help 21, 26, 27, 36; public opinion in support of 46n23; right to employ 51n96
self-interest 108, 184, 197n86
self-legislation 178, 185
self-praise 214
self-presentation 207
self-regulation 11, 13, 44
self-restraint 181, 195n56
self-sacrifice 184, 188
self-seeking interests 108
shame 179, 213–14, 218n62
'shame cultures' 179–80, 190
shamelessness 213–14
silence 157

situationism 102–3
slaves 173
social behaviour 89
social norms: acceptable 89; conforming to 82; existence of 185; internalisation of 181; non-adherence to 124, 131; understanding 89
social order 2, 36, 63
social role: and ethical motivation 178, 187–8, 198n113; and evaluating personality 158; engagement with 179
social status 74
socio-political structures 5
Socrates 81; *Laches* 114; *Meno* 111, 112; on knowledge as recollection 112–13
Solon 42, 65
Sophists 105–109
Sophocles 105
sophrosyne 181–2
soul: disharmonious state of 118; Plato on 114–15
speakers 153, 158, 210, 222; amateur 211; credibility of 57, 203; establishing concord with their hearers 209; good will towards 210; qualities of 29, 30; skilled 29–30, 150; supporting 31, 57, 87, 91n34, 148–9; *see also* orators
'speaking to the point' 2, 4, 7, 8, 22, 28, 44, 57, 222; *see also* rule of relevance
specificity 67
spectators 22, 31, 32, 42, 44, 48n45, 50n83; *see also* audience
speech-writers 22, 62; *see also* logographers
speech-writing 62
standard of proof 59–61
stare decisis 67
state pay 56
'stateless' societies 46n23
status 2; and ethical motivation 187–8; of defendant 67
statute law 85
storytelling 11, 21, 64
subcultures 180
substantive orientation 9
sui generis: legal cases; 79–80; procedures 71–3
supernatural, the 1
supportive speakers 31, 57, 91n34, 161n41, *see also synegoros*
sycophancy 66, 80, 145, 173, 174, 184, 205, 211, 214
sycophants 186–7, 198n110, 205
symbolism 28–9
synegoros 31, 62, 91n34, *see also supportive speakers*

talent 112
taphe 185
Teisias 107
theatricality 150
themistes 43
Theophemus 144–5
Theophrastus 150
thesmothetae 31, 43
thorubos 58–9
timesis 80–2, 129, 189
topos 147
traditionalism 30, 42, 44, 47n43, 50n89
trait theory 102–3
treason 174
trials: adversarial 12, 31, 38, 63–4; division of 80–1; familiarity in 22, 31; homicide 39; popular 11; types of 70; *see also* archaic trials
tripartite persuasion 207, 209
trophe 185
tropos 103–4; *see also* character; ethos
true nature 110
trust, maladministration of 78
trustworthiness 63, 84; and irrelevant argumentation 88; enhancing 64; of speakers 57, 206, 209–10; of witnesses 57
truth: attainment of 4, 5, 12–13, 17n24, 72, 85; Plato on 113; requirement to attest to 57

United Kingdom 146
United States 147
unlawfulness 124, 131
unmerited suffering 212
unwritten laws 2, 43
unwritten norms 26, 89, 157, 185
unwritten procedural rules 30
upbringing 212

verdicts *see* court verdicts
vices 124, 140
violence 182: drunken 142; towards parents 79
virtue: and education 109–10, 113–14; and knowledge 115–16; and voice 152; and voluntary choice 117; Aristotle on 115–16; habitual 116; moral 108, 207; political 110; teachability of 107; *see also arête*

vocal training 152
voice 151–2; and self-control 152; and virtue 152
voluntariness 184
voluntary actions 117
voluntary arbitration 32, 34–7
voluntary choice 117

will: autonomy of 178; free 126; *see also* good will
wills 73
wisdom 207
witnesses: characterisation of 148; credibility of 211; partisan 31, 57; role of 57
witnessing: false 57, 144–5, 148, 173
worthiness 76, 125, 141, 154, 164n81, 164n86
written laws 22, 23, 37, 50n92; absence of 157; conformity with unwritten ethical norms 185; emergence of 42–3; estimate of 7; of the *polis* 184; open texture 81

youth 27, 66, 122, 127, 188